90-1 39

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

THE STATE OF TEXAS
PETITIONER,

V.

JOHN SKELTON
RESPONDENT.

PETITON FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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QUESTIONS PRESENTED

I. WHETHER THE TEXAS COURT OF CRIMINAL APPEALS HAS MISAPPLIED THE RULE OF JACKSON V. VIRGINIA 443 U.S. 307 (1979) BY HOLDING THAT THE PROSECUTION IS UNDER AN AFFIRMATIVE DUTY TO DISPROVE EVERY HYPOTHESIS EXCEPT THAT OF GUILT BEYOND A REASONABLE DOUBT.

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NO._____

IN THE
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OCTOBER TERM 1990

THE STATE OF TEXAS
Petitioner,

V.

JOHN SKELTON,
Respondent.

PETITON FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES THE STATE OF TEXAS, Petitioner herein, by and through the District Attorney of Ector County, Mr. Gary P. Garrison, and files this petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals was delivered on the 13th day of December, 1989, in cause No. 69,215, John Skelton v. The State of Texas and is attached hereto as Appendix A; the order denying the State's Motion for rehearing is attached here as Appendix C. The order granting the State's Motion of Stay of Mandate until the 23rd day of July, 1990 is hereto attached as Appendix D-2.

JURISDICTION

The Judgment of the Texas Court of Criminal Appeals was entered on the 13th day of December, 1989 (Appendix A-17). A timely Motion for Rehearing was filed with the Court of Criminal Appeals on the 29th day of December, 1989 (Appendix B-1). The Motion for Rehearing was denied on the 2nd day of May, 1990 (Appendix C-1). This petition for Writ of Certiorari was filed within ninety (90) days after the State's Motion for Rehearing was denied below. The Jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's claim is based on the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The Respondent herein, John Skelton was indicted on June 17, 1982, for the offense of capital murder. Trial was held in the 161st District Court of Ector County, Texas during the month of June 1983 in cause number B-13,984, the State of Texas v. John Skelton. Appellant was convicted by the jury of the indicted offense and sentenced to death on July 8, 1983. Appellant perfected his appeal to the Texas Court of Criminal Appeals and his conviction was reversed on December 13, 1989. The State of Texas by and through her District Attorney filed a Motion for Rehearing on December 29, 1989. The motion was denied without written opinion on May 2, 1990.

In this motion for rehearing the state specifically alleged that the Texas Court of Criminal Appeals had misapplied the rule of Jackson v. Virginia, 443 U.S. 307 (1979).

The State made a motion for stay of mandate so that this petition for Writ of Certiorari could be effected and the same was granted on May 14, 1990. The mandate has been stayed by the Texas Court of Criminal Appeals until July 23, 1990.

SUMMARY OF ARGUMENT

There are special and important reasons for granting the writ. In holding that the prosecution has an affirmative duty to rule out every hypothesis except the guilt of the defendant beyond a reasonable doubt the Texas Court of Criminal Appeals has violated this court's holding in *Jackson v. Virginia*, supra.

This Court may entertain this issue because it is clear that the Texas Court of Criminal Appeals based its decision on federal law. The opinion of the Court of Criminal Appeals does not contain a "plain statement" that its decision rested on adequate and independent state law grounds.

The Texas Court of Criminal Appeals has placed an unconscionable, untenable, and virtually impossible burden on the State of Texas to prove guilt in criminal cases beyond a reasonable doubt. The Court of Criminal Appeals has held that the prosecution must rule out every hypothesis except that of the guilt of the defendant beyond a reasonable doubt, contrary to this Court's holding in *Jackson*. The Texas Courts holding is contrary to the Fifth Circuit Court of Appeals' exposition of *Jackson* and the Texas Court's purported adoption of the Fifth Circuit rule.

REASONS FOR GRANTING THE WRIT

I.

THERE IS ONE SINGULAR, PROFOUND, AND PARTICULARLY IMPORTANT REASON FOR GRANTING THIS WRIT.

The imposition of an affirmative duty on the prosecution to rebut or disprove every hypothesis except that of the guilt of the defendant is to place upon the State a burden far in excess of any that can be imagined under the traditional and constitutional standard of beyond a reasonable doubt. The imposition of this standard usurps the function of a jury and protects defendants from convictions to a degree that can only be characterized as untenable. The imposition of this standard allows intermediate state courts and state courts of last resort to ignore the evidence elicited at trial and the

determination by the trier of fact of a defendant's guilt or innocence by using a standard which has been expressly disallowed by this Court. The use of the "reasonable hypothesis theory" allows state appellate courts to ignore the standard of review propounded in *Jackson* and reverse those causes where the evidence is clearly sufficient. The use of this standard contravenes settled principles of appellate review by an unwarranted substitution of one fact finder for another.

II.

THE TEXAS COURT OF CRIMINAL APPEALS' HAS MISAPPLIED THE RULE OF *JACKSON v. VIRGINIA*, 443 U.S. 307 (1979) BY HOLDING THAT THE PROSECUTION IS UNDER AN AFFIRMATIVE DUTY TO DISPROVE EVERY HYPOTHESIS EXCEPT THAT OF GUILT BEYOND A REASONABLE DOUBT.

It is clear from the Texas Court of Criminal Appeals opinion in the instant case that the decision rested primarily upon Federal law and that the independence of an alleged state ground is not apparent from the four corners of the opinion. [1]

It is an ineluctable conclusion that the "reasonable hypothesis theory" is a rule which was specifically rejected in *Jackson* and has met with disapproval in the Fifth Circuit Court of Appeals. [2]

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1. The Court plainly based its opinion on Federal law, see Appendix, A-8. There the Court states it is "constrained" to follow *Jackson v. Virginia*, supra. The Courts decision is clearly within the purview of *Michigan v. Long*, 463 U.S. 1032 (1983) and its progeny; *Montana v. Hall*, 481 U.S. 400, (1987); *Maryland v. Garrison*, 480 U.S. 79 (1987); *Delaware v. Van Ardsall*, 475 U.S. 673 (1986).

2. *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), aff'd 462 U.S. 356 (1983).

In *Jackson,* the Court held, "Only under a theory that the prosecution was under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt could this petitioner's challenge be sustained. That theory the court has rejected in the past. *Holland v. United States,* 348 U.S. 121, 140, 99L.Ed.150,75 S.Ct.127. We decline to adopt it today."

This clear statement is not dicta but a fundamental part of the majority's opinion in *Jackson.* From this holding it is readily apparent that the rebuttal of reasonable hypotheses plays no part in the familiar Appellate standard, "...(t)he relevant question being whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt". *Jackson,* supra at 319.

The Petitioner does not come to this Court seeking a review of the factual basis of the Texas Court's opinion. Rather the Petitioner seeks a reversal of the judgment below because of the erroneous standard used. The Court of Criminal Appeals employed a standard not only in direct contravention of *Jackson,* but one that is fraught with difficulties that threaten the very nature of objective appellate review.

As applied, the rule allows appellate courts to escape the *Jackson* standard and substitute their own fact finding for that of the jury's. As is amply illustrated in the instant case, an appellate court can formulate a reasonable hypothesis other than the guilt of the defendant with great ease. The Texas Court of Criminal Appeals in this case held that, "the evidence, even when viewed in a light most favorable to the verdict, suggests at least one hypothesis other than the guilt of the Appellant: that is, that someone else unbeknownst to Appellant committed the offense." (Appendix A-8)

Clearly the determination of this defensive issue is within the purview of the trier of fact, and its determination of the fact issue adverse to Respondent should be sustained under *Jackson.* The Texas Court of Criminal Appeals' statement

that "it is the Appellate Court's function to ensure that no one is convicted of a crime except on proof beyond a reasonable doubt" (Appendix A-8), is so basic to our system of jurisprudence that it does not admit of argument. But the proposition that an appellate court will use the reasonable hypothesis theory to reverse a case sustainable under the Constitutional standard is to turn the rule of *Jackson* on its head. The Texas Court of Criminal Appeals has specifically adopted the *Jackson* standard of review in circumstantial evidence cases. A review of the opinions where this standard was adopted highlights the Court of Criminal Appeals' attempt to adopt one half of the Constitutional standard formulated by this Court while adjuring the other.

Butler v. State, 769 S.W.2d 234 (Tex.Crim.App. 1989), illustrates this attitude. In that case, the Texas Court of Criminal Appeals considered the sufficiency of the evidence in a murder case. In the majority opinion, the court held that the *Jackson* standard requires that upon review by an appellate court "all the evidence is to be considered in a light most favorable to the prosecution." Id at 238. The court went on to hold that,

> "The Texas Court of Criminal Appeals has often elaborated upon the *Jackson* standard for the sufficiency of evidence reviews in this state. See *Carlsen v. State,* 654, S.W.2d 444, 448-49 (Tex.Crim.App. 1983) (opinion on Reh'g) and *Moreno v. State,* 755 S.W.2d 866 867 (Tex.Crim.App. 1988). Carlsen points out, that circumstantial evidence should not be tested by ultimate standard of review' different from direct evidence; the standard in both kinds of cases is whether 'any rational trier of fact could have found the essential element of the crime beyond a reasonable doubt.' (citation omitted). ...It is apparent then, that circumstantial evidence cases have no different standard of review than those cases supported by direct evidence."

The Court then clarified this position with the following footnote;

> "Implicit in this statement is a question concerning the status of the reasonable hypothesis theory. We reiterate:
>
> We are unable to devise or discover any reason,... for abandoning the utilitarian 'exclusion of outstanding reasonable hypotheses analysis for applying the above standard for review' *(Jackson)* in circumstantial evidence cases. By the nature of circumstantial evidence, in order to determine it rationally establishes guilt beyond a reasonable doubt, a process of elimination must be used... Stated in the converse, if the evidence supports an inference other than the guilt of the Appellant, a finding of guilt beyond a reasonable doubt is not a rational finding. *Carlsen,* 654 S.W.2d at 449. We recognize that the United States Supreme Court declined, in *Jackson,* to adopt this theory as part of the *Jackson* standard for review. Likewise, we do not mean to imply an adoption of this theory as the standard of review for sufficiency of the evidence. The reasonable hypothesis theory as utilized by this Court is merely an analytical construct to facilitate the application of the *Jackson* standard."

Although the Court of Criminal Appeals purports to have adopted the *Jackson* standard to review the evidence in criminal cases, its use of the euphemistic "analytical construct" to circumvent the rest of the holding in *Jackson* is no more than Judicial sleight of hand. This "analytical construct" is a corollary rule of law by which the Texas Court of Criminal Appeals seeks to avoid the full import of *Jackson.* [3]

This contention is best summarized by Judge White of the Texas Court of Criminal Appeals who concurred in the *Butler* opinion. Judge White stated,

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3. In *United States v. Bell,* supra fn.2, the Fifth Circuit Court of Appeals held that the hypothesis of innocence phraseology was not merely semantic and adopted the standard of review stated therein. *Bell,* supra 549, fn.3.

> "Thus, *Jackson* specifically denounces the "reasonable hypothesis theory" while the majority embraces it. Further, whether this theory is euphemistically labeled as an "analytical construct" (See op.at 238, fn.1) *or* a standard of review is of little moment; the resultant effect remains the same - the adoption of a theory of sufficiency review expressly denounced by *Jackson*. Thus, although the majority, by all auspices, fully adheres to *Jackson*, it appears to me that such adherence is disturbing selective.
>
> Because the Court sees fit to selectively adhere to certain convenient aspects of *Jackson*, supra and Moreno, supra, while completely disregarding the less palatable holding of those opinions, I must concur only in the result reached." *Butler*, supra at 244.

Clearly the Texas Court of Criminal Appeals has misapplied the rule of *Jackson*. The "reasonable hypothesis theory" has been renounced by the Fifth Circuit Court of Appeals (supra, fn.2) and has fallen into disfavor in other jurisdictions.[4]

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4. *Ciccaglione v. State*, 474 A.2d 126 (Del. 1984); *Esmailka v. State*, 740 P.2d 466 (Alaska 1987); *Ford v. United States*, 498 A.2d 1135 (D.C. Ct.App. 1985); *Kidd v. State*, 530 N.E.2d 287 (Ind. 1988); *People v. Acosta*, 396 N.W.2d 463 (Mich. App.); *People v. Bean*, 760 P.2d 996, 1003 (Cal. 1988); *People v. Pintos*, 527 N.E.2d 312 (Ill.App. 1988); *Poellinger v. State*, 451 N.W.2d 752 (Wis. 1990); *State v. Buchanan*, 312 N.W.2d 684 (Neb. 1981); *State v. Caruolo*, 524 A.2d 575, 581 (R.I. 1987); *State v. Couch*, 720 P.2d 1387 (Wash.App. 1986); *State v. Derouchie*, 440 A.2d 146, 148-149 (Vt. 1981); *State v. Diaz*, 346 S.E.2d 488 (N.C. 1986); *State v. Duran*, 762 P.2d 890 (N.M. 1988); *State v. Jacobson*, 419 N.W.2d 899 (N.D. 1988); *State v. McKibben*, 722 P.2d 518 (Kan. 1986); *State v. Nash*, 694 P.2d 222 (Ariz. 1985); *State v. Randles*, 768 P.2d 1344, 1346-1347 (Id. 1989); *State v. Sabers*, 442 N.W.2d 259 (S.D. 1989); *Stokes v. State*, 518 So.2d 1224 (Miss. 1988)

The United States Circuit Courts of Appeals have abandoned the vestiges of this test.[5]

It is apparent that the Texas Court of Criminal Appeals has adopted *Jackson* both in the instant cause and as the standard of review for criminal cases in the State of Texas. It is also readily apparent that the rule of *Jackson* has been misapplied, and that the same harmful misapplication will continue without the intervention of this Court. The State should not be deprived of verdicts proved beyond a reasonable doubt.

CONCLUSION

For these reasons petitioner prays that the petition for Writ of Certiorari to the Texas Court of Criminal Appeals issue and this case be reversed.

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5. *Dirring v. United States,* 382 F.2d 512, 515 (1st Cir. 1964), cert. denied 377 U.S. 1003 (1964); *United States v. Fiore,* 821 F.2d 127, 128 (2nd Cir. 1987); *United States v. Leon,* 739 F.2d 885, 891 (3rd. Cir. 1984); *United States v. Bobo,* 477 F.2d 974, 989 (4th Cir. 1973), cert. denied 421 U.S. 909 (1975); *United States v. Carter,* 486 F.2d 1027, 1028 (6th Cir. 1973); *United States v. Bakken,* 734 F.2d 1273, 1282 (7th Cir. 1984); *United States v. Hoelscher,* 764 F.2d 491, 494 (8th Cir. 1985); *United States v. Nelson,* 419 F.2d 1237, 1242 (9th Cir. 1969); *United States v. Merrick,* 464 F.2d 1087, 1092 (10th Cir. 1972), cert. denied 409 U.S. 1023 (1972); *United States v. Davis,* 562 F.2d 681, 689 (D.C. Cir. 1977); *United States v. Poole,* 878 F.2d 1389 (11th Cir. 1989).

Respectfully submitted,

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APPENDIX A

JOHN SKELTON, Appellant

NO. 69,215, v. ---- Appeal from Ector County

THE STATE OF TEXAS, Appellee

OPINION

After a lengthy trial appellant was convicted for capital murder. Punishment was assessed at death.

The evidence showed that on the morning of Saturday, April 24, 1982, an individual by the name of Joe Neal climbed into his pickup truck with the intention of taking one of his daughters to choir practice. Neal apparently turned on the truck's ignition, put the truck in reverse. This act set off a bomb which had been placed under the truck. The explosion propelled Neal's body out of the truck, ripped off his left wrist and hand as well as both legs. Medical testimony indicated that Neal bled to death as a result of his injuries.

Testimony at trial showed that upon viewing the scene of the explosion, authorities found pieces of a 6-volt K-Mart lantern battery and two halves of a broken horseshoe magnet wrapped with duct tape. Vance Johnson, an agent with the Bureau of Alcohol, Tobacco, and Firearms testified that in his expert opinion the explosion was caused by more than two or three sticks of dynamite which were hooked up to the electrical wiring leading to the back up lights of the pickup truck. The bomb was attached so that when the truck was placed in reverse, it would detonate. He further testified that in his opinion the 6-volt battery was used as a backup power source in case the electrical system of the truck failed. It was also his opinion that the bomb was placed directly underneath the floorboard area of the driver's side of the truck. Jerry Taylor, another agent from the Bureau of Alcohol, Tobacco, and Firearms, testified that he estimated that the bomb was made up of four to seven sticks of dynamite. He also felt that the bomb had been placed directly under the floorboard areas of the driver's side of the truck. Dr. Elliot Byall, chief of the Forensic

Branch of the Bureau of Alcohol, Tobacco, and Firearms Lab in San Francisco, testified that he conducted tests on gauze swabs that had been taken from the victim and ascertained the presence of dynamite vapors and nitroglycerin, one of the components of dynamite.

Testimony at trial connected appellant to the offense. Robbie Smart, who characterized his relationship with the appellant as a father-son relationship, testified that up until 1981, appellant had owned Husky Steam Cleaners. Smart testified that he began working for appellant at Husky in 1975. He was promoted to plant superintendant in 1980 and essentially ran the business for appellant who traveled frequently. Smart related that the victim came to work for Husky as a salesman in 1979. The victim left Husky's employment in 1980 after appellant accused him of selling hot tanks produced by Husky and keeping the money from the sales for himself. Appellant also thought his own son, Jerry Don Skelton, and another salesman, Bob Fowler, were also involved in the scheme. Smart testified that on several occasions appellant discussed having someone break the arms of both Fowler and the victim, and on one occasion, appellant told Smart that he had a cousin in prison who would help him find someone to do the job. Smart testified that appellant also threatened to break the arms of two other individuals who were business competitors, a Mr. Berryhill and Glen Danielson. Appellant also told Smart that in June of 1981 that he had tried to file false theft charges against the victim and Fowler. As part of this plan appellant had given two steam machines to two men in Andrews, Texas, in exchange for their agreeing to falsely testify that the victim and Fowler had sold them the machines for cash and pocketed the money. Appellant also admitted this during his own testimony. Smart also testified that on one occasion appellant told him that he had hired someone to firebomb American Steam Cleaners in Odessa. American Steam Cleaners was owned by appellant's competitor, Berryhill, and both the victim and Fowler had gone to work there after leaving appellant's employment. Smart related that he did not believe appellant's threat regarding the firebomb, but several days later American Steam Cleaners was indeed fire bombed. Not content with that, in August of 1981, appellant told Smart that he was going to kill the victim. Appellant said that he was going to catch the victim in his truck and shoot him. Appellant also said that he knew

the victim always carried a gun and if the gun was not there, he would plant one on him after he had killed him. When Smart tried to dissuade appellant, appellant's only answer was that he also wanted to kill Danielson, Fowler and his son, Jerry Don Skelton.

In January of 1982, appellant again told Smart that he was going to get even with the victim and Fowler. In March of 1982, appellant came to Smart's house and said he was working on a project and needed four horseshoe magnets. He said he had a surprise for the victim and that Smart would be surprised when he heard about it. Appellant told Smart to go out to Husky (which had since been sold to a partnership) and take four magnets from their inventory. Smart was to give those magnets to appellant and then order four new replacement magnets. However, Smart was told not to put the replacement order on the books. When Smart cautioned appellant that the magnets could be traced, appellant told Smart that if he followed directions, everything would be all right. Appellant told Smart that he was going to "scare the shit out of some people." On March 25, 1982, Smart removed the four magnets from the Husky Parts Department. The next day he gave them to appellant. Appellant told Smart that on a recent trip through the South, he had met some trained mercenaries who had showed him a lot about explosives. On April 8, 1982, Smart ordered some new magnets to replace the ones he had taken from Husky. On April 19, appellant called Smart and asked if the new magnets had come in. When Smart told him that they had not, appellant remarked that they should be in in a day or two. Then he told Smart that if something spectacular happened to send the newspaper clippings to some friends of his in Arkansas. Smart testified that the magnets did not come in until April 28, four days after the bombing.

Smart testified that he was out of town during the weekend of the bombing. Upon learning of the bombing after his return, he was shocked. On Friday, April 30, he took the new magnets back to Husky as appellant instructed. Finally Smart testified that he received a call on May 6, from a man named L.C. Neatherlin, who was related to appellant by marriage. Neatherlin asked Smart to come to his business at 10:00 the next morning to fix a steam cleaner. When Smart arrived the next morning, Neatherlin took him into an office, handed him the phone and told him that appellant

wanted to speak to him. When Smart told him that the victim had been killed, appellant replied that he hated to hear it but he could not say he was sorry. Appellant also told Smart that he was in Arizona at the time of the bombing and had alibi witnesses who would testify to that fact. Appellant asked Smart not to tell the police that he had called. Finally Smart testified that a few days prior to his testimony, he had received a phone call during which the caller said that both he and his daughter were dead.

Ron Masterson, the owner of a distributorship for steam cleaning equipment in Springfield, Tennessee, testified that he had known appellant for approximately five years. In March of 1982, appellant called Masterson and asked him to try to find him some dynamite. Appellant said that he needed twenty sticks of dynamite and ten blasting caps in order to remove some stumps from his farm in Arkansas. After this initial request, appellant called some six to seven times over the next few days inquiring about the dynamite. During these conversations appellant also told Masterson that he was living in Springfield, Missouri, with a doctor named Judy Parton. On April 4, 1982, appellant came to see Masterson. The next morning they obtained ten sticks of dynamite and blasting caps from a contractor friend of Masterson. When Masterson asked appellant if he knew how to use the dynamite, appellant replied that the dynamite would explode if the wires leading from the blasting caps were hooked up to the terminals of a 6-volt battery. Appellant then placed the dynamite in an ice chest and sealed it with duct tape. He then put the ice chest inside of a hot tank (used in steam cleaning) which Masterson was returning to appellant. The hot tank was then bolted and the threads on the bolt were then damaged so as to prevent anyone from opening the box. Appellant then put the hot tank in the back of his pickup truck. On April 6, appellant left Tennessee and returned to Missouri. Between April 6 and April 14, appellant called Masterson several times. Each time, appellant told Masterson that he had not yet used the dynamite.

Leonard Robinson, the parts manager for Husky Cleaning Systems, testified that he checked his magnet inventory on April 27, 1982. He was surprised to find only one magnet when there should have been five. A few days later, Robbie Smart brought back four magnets and said that he was

returning them because he did not need them. After Smart left the shop, Robinson went back and checked the magnets. He testified that he was surprised to see that the boxes they were in were not dusty and showed not signs of ever having been marked with a price.

Danny Kirby, supervisor of the DPS laboratory in Houston, testified that he was given State's Exhibit 95 (a piece of wrapper taken off a stick of dynamite obtained by the police from Blevins Ditching and Excavating Company in Jamestown, Tennessee), State's Exhibit 96 (a scrap of dynamite paper found in the vehicle behind the driver's seat after the blast) and State's Exhibit 89 (long fibrous materials found with several pieces of metal at the bomb scene). State's Exhibit 95 had been removed from a piece of dynamite manufactured by the Austin Powder Company with a date shift code of 2C0254. Earlier testimony revealed that all of the dynamite purchased by the excavation company between March 8, 1982 and April 23, 1982 had the same date shift code, indicating it was manufactured on the same shift. No testimony was given as to the date on which the dynamite given to appellant was purchased by the excavation company nor what date shift code was on the dynamite given to appellant. Kirby testified that after his scientific analysis he determined that all of the papers had the same chemical origin. He also testified that he had been asked to test State's Exhibits 69 and 71 (the parts of a magnet found at the scene of the explosion), State's Exhibit 84, (the magnets returned to Husky by Robbie Smart after the explosion) and State's Exhibit 88 (the sole magnet remaining in the Husky inventory after Robbie Smart removed four magnets and gave them to appellant). After running tests on these exhibits, he came to the conclusion that the paint on all the magnets had the same chemical properties.

Appellant presented several alibi witnesses who testified that appellant was in Springfield, Missouri on April 23 and April 24. A Springfield pharmacist testified that he filled three prescriptions for appellant sometime between 6 p.m. and 9 p.m. on the day of the murder, April 24th. Dr. Judy Parton, a friend of appellant's and a physician in Springfield testified that appellant took her to work on the morning of April 23 and picked her up at 3 p.m. that afternoon. They spent the evening together and then had breakfast together

on the morning of April 24. She then went to work and appellant picked her up around 4:00 p.m. that afternoon. According to Dr. Parton, appellant stayed in the Springfield area until April 27.

After presentation of the defense case, the State offered rebuttal. Warren Heagy, an attorney and half owner of Husky Cleaning Systems, Inc. testified that after he and his partner had purchased the company from appellant in May of 1981, appellant told him he suspected the victim and an indivdual named Bob Fowler had been stealing from him while they both had been employed as salesmen for appellant. Appellant showed Heagy two invoices which purported to reflect a sale of a steam unit by each salesman. According to appellant, the men were stealing steam units from appellant and then selling them for cash. Heagy testified that he noticed that the invoices were both dated some six months after both salesman had left appellant's employment. Furthermore, the invoices were consecutively numbered and the invoice supposedly prepared by the victim was full of typographical errors which was extremely unusual since the victim was an excellent typist. Heagy testified that appellant quizzed him about the possibility of both men going to the penitentiary. When Heagy told appellant that they would probably get probation, appellant said that that he would take care of them in his own way. Heagy related that appellant seemed obsessed with the two men.

Another witness, John Campbell, testified that he had business dealings with both appellant and the victim. Campbell related that appellant told him he hated the victim and wanted to kill him. When Campbell asked if appellant was going to shoot the victim, appellant replied in the negative. Appellant further replied that shooting the victim with a gun would be too easy and he wanted to make him suffer. Skelton also told Campbell that he had been a demolitions expert in the military. On another occasion appellant told Campbell that he was going to falsely accuse the victim and Bob Fowler of stealing equipment from him in order to get them convicted and sent to the penitentiary.

In an attempt to rebut appellant's alibi witnesses the State also called Sheridan Carol Kirkland to the stand. Kirkland, a former neighbor of appellant testified that she saw appellant driving down an Odessa street at 3:00 p.m. on April 25, 1982, the day after the bombing. Kirkland testified that she noticed at that time that appellant looked especially tired.

Another neighbor, Carrie Scholl, testified that appellant called her the evening of the bombing. When she told him about the bombing, he appeared to be shocked. After her testimony the State rested.

In his portion of rebuttal, appellant introduced evidence showing that the call to Carrie Scholl had been made from Room 404 of the Interstate Inn Motel in Springfield, Missouri.

During this portion of the case, appellant took the stand. He related that he obtained the dynamite in Tennessee for the purpose of blowing up tree stumps on his farm in Arkansas. However, he was never able to use the dynamite for that purpose because it was stolen out of his truck in Springfield, Missouri. He also related that he was in Springfield, Missouri from April 16 to April 26 and during that time he stayed in Room 404 of the Interstate Inn Motel. He testified that he called Carrie Scholl on the evening of April 24 in an attempt to locate his wife, and when Scholl told him that "Joe Fowler" had been killed by an explosion, he thought she was kidding. Appellant also admitted talking to Robbie Smart over the telephone on May 7. He testified that he called Robbie at O. C. Neatherlin's Fiat dealership to discuss the repair of Neatherlin's steam cleaner by Robbie. It was during this conversation that Robbie told him that Joe Neal had been killed and that the police wanted to talk to him. Appellant denied that he had ever received any magnets from Robbie Smart.

In his sixth and seventh points of error, appellant argues that the evidence is insufficient to convict him either as a sole actor or as a party. The indictment in the instant case contained two paragraphs. The jury was charged on the first paragraph which alleged that appellant did:

> "knowingly and intentionally while in the course of committing and attempting to commit arson of a vehicle owned by Joe Neal, intentionally cause the death of Joe Neal, hereafter styled the Complainant by placing an explosive weapon on the vehicle of the Complainant, and causing said weapon to explode."

In addition, the jury was charged that they could convict appellant either by his acts alone or as a party. The verdict of the jury does not indicate whether they found appellant guilty as a party or as acting alone.

In both circumstantial and direct evidence cases the standard by which evidence is reviewed is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Houston v. State, 663 S.W.2d 455 (Tex.Cr. App. 1984); Carlsen v. State, 654 S.W.2d 444 (Tex.Cr.App. 1983); Butler v. State, 769 S.W.2d 234, 238 (Tex.Cr. App. 1989). In Denby v. State, 654 S.W.2d 457, 464 (Tex.Cr.App. 1983) (Opinion on Rehearing), this Court noted that "if the evidence supports an inference other than the guilt of the appellant, a finding of guilt beyond a reasonable doubt is not a rational finding." Proof which amounts to only a strong suspicion or mere probability is insufficient. It is the appellate courts' function to ensure that no one is convicted of a crime except on proof beyond a reasonable doubt.

After viewing the evidence in the light most favorable to the verdict, as we are constrained to do, Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), we find that we agree with appellant as to both points. Although there is plentiful evidence to show that appellant made numerous threats against the victim and that two weeks before the offense he was in possession of materials similar to those used in the commission of the offense, we find no evidence which connects appellant with the actual setting of the bomb, nor is there any evidence showing that he solicited, encouraged, directed, aided or attempted to aid another individual to place the bomb. V.T.C.A., Penal Code, Section 7.02(a) (2). The evidence, even when viewed in the light most favorable to the verdict, suggests at least one hypothesis other than the guilt of appellant: that is, that someone else unbeknownst to appellant committed the offense.

The only evidence which even comes close to linking appellant to the actual placing of the bomb is the fact that in late March or early April, appellant obtained eleven sticks of dynamite from Blevins Ditching and Excavating Company in Jamestown, Tennessee. In addition, the State produced testimony that on March 20, appellant had asked Robbie Smart to procure four magnets for him from the Husky Steam Cleaning inventory, but not to put the transaction on the books. Instead Smart was to substitute new magnets in their place. The State, in its argument to the jury at the conclusion of the guilt-innocence phase relied heavily on testimony from Danny Kirby, the supervisor of the DPS lab in Houston, in arguing that the scraps of dynamite paper and pieces of magnet found at the scene of the blast could be tied to appellant. The State in that argument misconstrued Kirby's testimony and because of that misconstruction we now set out Kirby's testimony in some detail to show how the State's case was deficient.

As noted above, Kirby testified that he was given State's Exhibit 95 (a piece of wrapper taken off a stick of dynamite obtained by the police from Blevins Ditching and Excavating Company in Jamestown, Tennessee, State's Exhibit 96 (a scrap of dynamite paper found in the vehicle behind the driver's seat after the blast) and State's Exhibit 89 (long fibrous materials found with several pieces of metal at the bomb scene). State's Exhibit 95 had been removed from a piece of dynamite manufactured by the Austin Powder Company with a date shift code of 2C0254. During the State's direct examination of Kirby, the followng testimony was elicited:

"Q. And would you tell the -- are these the items that you did the comparison on to locate fibers from the paper of the dynamite?

"A. Yes.

"Q. All right. Now then, would you please tell the jury how you tested these items to come to any type of conclusion?

"A. Okay. The fibers found here in these pieces of metal, also the pieces of metal inside here were upon the surface of the metal and I removed those fibers from that fibrous material and

looked at them microscopically and also ran a solubility test, or a second solubility test and a G.C. Pyrolysis. I did the same for State's Exhibit No. 96 which is the brown rolled paper substance which was found in the Neal vehicle, and the same -- I removed some of the wrapper material that was submitted by Frankie Hodges which is State's Exhibit 95 and ran the same test on those. The results were these fibrous material found on all of these did have the same chemical and physical properties.

"Q. Did you examine (State's Exhibit 89)?

"A. Yes, I did.

"Q. And you did then also examine State's Exhibit No. 95, the dynamite wrapper submitted by the Alcohol, Tobacco & Firearms from the Ike Blevins place of business?

"A. Yes, I did.

"Q. And you did also examine State's Exhibit No. 96, a piece of fibrous material found in the back of the Joe Neal vehicle, and you did conduct those tests; is that correct?

"A. Yes, I did.

"Q. And all those match?

"A. Yes, they do."

During cross-examination the following occurred:

"Q. And your examination into those three exhibits, 95, 96, and 89 just showed they were the same type of paper?

"A. The same type of material, yes, sir.

"Q. Under accord with the three tests that you made there were no dissimilarities?

"A. No dissimilarities that I noticed.

. . .

"Q. And those tests merely indicated that all of those items could have made a common origin?

"A. Yes, sir.

"Q. And could not have a common origin?

"A. I am sorry?

"Q. And could not have had a common origin?

"A. And may have not had."

Viewing this testimony in the light most favorable to the verdict, there is nothing in this testimony which shows that the dynamite obtained by the appellant, was the same dynamite used in the explosion. At most it demonstrates that the paper used to wrap the various sticks of dynamite was made out of the same ingredients. This evidence does not foreclose that someone other than appellant could have obtained dynamite wrapped in the same kind of paper and made a bomb with which to kill the victim.

Similar evidence was adduced concerning the various magnets involved in the case. Kirby was asked to test State's Exhibits 69 and 71 (the parts of a magnet found at the scene of the explosion), State's Exhibit 84, (the magnets returned to Husky by Robbie Smart after the explosion) and State's Exhibit 88 (the sole magnet remaining in the Husky inventory after Robbie Smart removed four magnets and gave them to appellant). Kirby testified that he performed three types of tests on paint scrapings taken from the magnets:

"Q. So to the best of your scientific knowledge, and based on your scientific analysis, the properties contained in all of those magnets, the ones submitted by Detective Smith from Husky, the one submitted by the crime scene and the one submitted by Detective Smith in the group basically have all the same characteristics?

"A. Yes, especially the paints.

. . .

"Q. So the best of the scientific state in the art of analysis at this time, through all the testing that you have done and been experienced with, those magnets have the same properties?

"A. Yes, and the paints do. I should clarify that the paints and the magnets do."

On cross-examination, the following occurred:

"Q. Your test of the red paint on the magnet has indicated they were all painted with the same kind of paint?

"A. Yes, sir.

"Q. As are probably millions of other objects in the world?

"A. I don't know.

"Q. But there could be innumberable things that are painted with that same kind of red paint?

"A. There again, I am not sure. I am not sure where the paint came from, what they utilize that particular paint for other than magnets.

"Q. Right. But the magnets were just all painted with the same kind of red paint. That is all that means?

"A. Yes, sir.

"Q. And it would be if Joe Neal had owned that red magnet like that, it would be the paint would match on that; wouldn't it?

"A. I didn't test one. I don't know.

"Q. Right. But all that shows was that those three magnets were painted or all those magnets were painted with the same red paint?

"A. Yes, sir.

"Q. And it is probably safe to assume that every magnet that that company ever made was painted with the same kind of red paint?

"A. It may be. It is possible, yes, sir."

Although the evidence against appellant leads to a strong suspicion or probability that appellant committed this capital offense, we cannot say that it excludes to a moral certainty every other reasonable hypothesis except appellant's guilt. Nathan v. State, 611 S.W.2d 69 (Tex.Cr.App. 1981); Flores v. State, 551 S.W.2d 364 (Tex.Cr.App. 1977). Specifically, there remains the outstanding possibility that someone other than appellant committed the offense.

This Court encountered a similary situation in Nathan v. State, supra. In *Nathan,* the victim's body was discovered on a Texas beach a little over four years after the victim's disappearance. Nathan was convicted of murder with malice. On appeal, Nathan argued the evidence was insufficient to prove that he committed the offense. The States' evidence showed the following:

> "(1) The deceased, a man of regular habits who was planning a trip to Louisiana the next day, left his home on the morning of October 6, 1972, to collect a debt or debts. He usually carried $200.00 to $300.00 or more dollars in cash. He never returned home.
>
> (2) The deceased indicated that morning to the witness Ford he intended to see the appellant about a debt due him.
>
> (3) The deceased was placed at the Sunlight Baptist Church on that date inquiring about the appellant.
>
> (4) The deceased was seen leaving the area of the church with the appellant in his car on Cedar Street about 10 a.m. on October 6, 1972. This was the last time he was seen alive.

(5) The appellant called his place of employment at 2:45 p.m. on the date in question and said he could not drive the afternoon school bus.

(6) When the deceased did not return home at 8 p.m. on October 6, 1972, a search led to the appellant, who took relatives to the Sunlight Baptist Church where he claimed he had last seen the appellant working on his car. The car was found there and was in working order. Appellant was described by witnesses as being nervous and acting strange and attempting to lead them on 'wild goose chases.'

(7) Leroy Broussard testified that while searching for his uncle with the appellant the next morning (October 7, 1972) the appellant had displayed a pistol and stated a spot on the back of his car was rabbit blood. Appellant also told police officers the spot was rabbit blood. When the car was turned over to the police for examination, it appeared to have been washed and the seats appeared to have had water or other fluid used on them.

(8) A chemist testified that some of the stains in appellant's car were of human blood but could not be typed. It could not be determined whether other blood stains were human or animal.

(9) Dr. Jachimczyk testified the bullet holes in the shirt were made by a .32 caliber weapon or a small weapon.

(10) The police found .32 caliber shells in the compartment of appellant's car.

(11) The remains contained coins, etc., as earlier described but no billford, or wallet with cash as normally carried by the deceased was found.

(12) Although the appellant was unable to pay the full amount of the motel bill on October 4, 1972, he was able to pay the balance several days later. And on October 7, 1972, he gave $123.00 to Shirley

> Little and paid a gasoline bill and other bills about that date. It was shown he spent $271.40 from October 7th and October 9th.
>
> (13) Over three years after the disappearance of the deceased in November, 1975, the appellant told his current girlfriend, Vera Jones, during an argument over the termination of their relationship that he had 'got rid of one person' and could 'get rid of another' and no one would find out." 611 S.W.2d at 76-77 (footnote omitted)

This Court after reviewing the evidence found that although the proof cast great suspicion on Nathan, the State had not succeeded in excluding every other reasonable hypothesis. Thus Nathan's conviction was reversed and an acquittal was entered.

The case of Flores v. State, supra, is also very similar. *Flores* was a murder case in which the most damaging evidence against the defendant was that he was found in possession of the deceased's car approximately twenty-four hours after the deceased was last seen alive. When Flores was arrested some six weeks later he was still in possession of the deceased's car, the car bore license plates which had been issued to another car and there was evidence that Flores had recently stored a suitcase with many items belonging to the deceased. While finding that the evidence cast great suspicion on Flores, this Court found that the evidence did not exclude to a moral certainty every other reasonable hypothesis except the appellant's guilt.

We see no difference between *Nathan, Flores* and the instant case. Although this Court does not relish the thought of reversing the conviction in this heinous case and ordering an acquittal, because the evidence does not exclude every other reasonable hypothesis, we are compelled to do so. The judgement is reversed and an order of acquittal is entered. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978).

McCormick, Presiding Judge

(Delivered December 13, 1989)

En Banc

Publish

Miller, J., dissents

White, J., not participating

JOHN SKELTON, Appellant

NO. 69,215 v. Appeal from ECTOR COUNTY

THE STATE OF TEXAS, Appellee

DISSENTING OPINION

I dissent. I believe the evidence sufficiently supports the jury's verdict of guilt.

The standard of review for sufficiency claims in whether, viewed in the light most favorable to the judgment, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Butler v. State,* 769 S.W.2d 234 (Tex.Cr.App. 1989). This identical standard applies to sufficiency challenges involving circumstantial evidence cases.

Id.

In the case at bar, appellant had the motive; indeed, the express intention, to kill the victim. Appellant acquired horse shoe magnets and dynamite - key ingredients to the bomb - shortly before the victim met his death. Appellant indicated something "spectacular" that would make the newspapers was going to happen. Appellant's dubious claim that the dynamite was stolen from his truck, along with appellant's bizarre series of phone calls to Robbie Smart and Carrie Scholl, also implicate appellant. Furthermore, given that the jury received a "parties charge" in this case, I would find the evidence sufficient to exclude every other reasonable hypothesis other than appellant's guilt. *Willis v. State,* No. 69,936, _____ S.W.2d _____
(Tex.Cr. App. delivered June 7, 1989).

Accordingly, I respectfully dissent.

BERCHELMANN, Judge

Delivered: December 13, 1989

EN BANC

PUBLISH

APPENDIX B

OFFICIAL NOTICE FROM CLERK'S OFFICE
COURT OF CRIMINAL APPEALS

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

Austin, Texas December 29, 1989

Dear Sir:

I have this day *received and filed the state's motion for rehearing*
In Cause No. *69,215, John Skelton*

vs.

THE STATE OF TEXAS, Appellee.

Sincerely yours,

Thomas Lowe, Clerk

RECEIVED IN ECTOR COUNTY DISTRICT ATTORNEY'S OFFICE, ODESSA, TEXAS

APPENDIX C

OFFICIAL NOTICE FROM THE CLERK'S OFFICE
COURT OF CRIMINAL APPEALS

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

Austin, Texas, May 2, 1990

Dear Sir:

I have been instructed to advise that the Court has this day denied the *State's* Motion for Rehearing in Cause No. *69,215*
John Skelton

vs.

THE STATE OF TEXAS Appellee.

Sincerely yours,

THOMAS LOWE, Clerk

RECEIVED IN ECTOR COUNTY DISTRICT ATTORNEY'S OFFICE, ODESSA, TEXAS

APPENDIX D

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

JOHN SKELTON **CAUSE NUMBER: 69,215**

VS.

STATE OF TEXAS

On this 14th day of May , 1990, came on to be considered the motion of the Assistant District Attorney to stay the issurance of the mandate in this cause for a period of 60 days.

AND SUCH MOTION is hereby granted. The mandate in this cause is due to issue on 7-13-90.

IT IS SO ORDERED.

PER CURIAM

A TRUE COPY ATTEST:

Thomas Lowe, Clerk
Court of Criminal Appeals

By: Louise Hudson
Deputy Clerk

COURT OF CRIMINAL APPEALS
TEXAS
OF TEXAS

APPENDIX D

AUSTIN, TEXAS

JOHN SKELTON **CAUSE NUMBER: 69,215**

VS.

STATE OF TEXAS

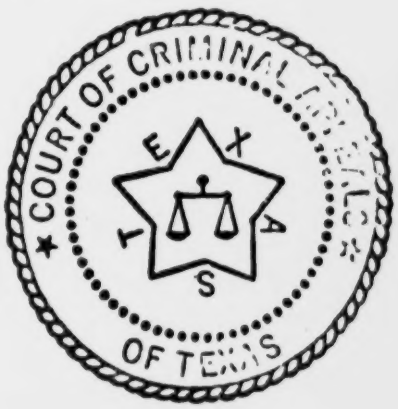
On this 5th day of July, 1990, came on to be considered the second motion to stay execution of mandate filed by the assistant district attorney in the above-styled cause.

AND SUCH MOTION IS HEREBY GRANTED for a period of ten days from the current deadline. The mandate in this cause is due to issue on 7-23-90.

IT IS SO ORDERED.

PER CURIAM

A TRUE COPY ATTEST:



Thomas Lowe, Clerk
Court of Criminal Appeals

By: Louise Hudson
Deputy Clerk

(2)

No. 90-139

In The

Supreme Court of the United States

October Term, 1990

THE STATE OF TEXAS,

Petitioner,

vs.

JOHN SKELTON,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

RESPONDENT JOHN SKELTON'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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No. 90-139

In The

Supreme Court of the United States

October Term, 1990

THE STATE OF TEXAS,

Petitioner,

vs.

JOHN SKELTON,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Criminal Appeals Of Texas

RESPONDENT JOHN SKELTON'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Respondent, John Skelton, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Court of Criminal Appeals of Texas. That opinion is not yet reported, but is reprinted in its entirety in the State's petition at A-1 to A-17 (hereinafter referred to as Pet. at ___).

NATURE OF THE CASE AND PROCEDURAL HI8TORY OF THE CASE

On July 17, 1982, a two paragraph indictment for, respectively, capital murder and murder was filed. Therein, it was alleged that on April 24, 1982, Respondent did:

> " . . . knowingly and intentionally while in the course of commiting and attempting to commit arson of a vehicle owned by Joe Neal, intentionally cause the death of Joe Neal, hereafter styled the Complainant by placing an explosive weapon on the vehicle of the complainant, and causing said weapon to explode.
>
> " . . . did then and there unlawfully, knowingly and intentionally cause the death of Joe Neal . . . by placing an explosive weapon on the vehicle of the Complainant, and causing said weapon to explode. . . . "

Upon learning of the indictment, Respondent voluntarily returned to Odessa from Missouri, turned himself in, and was thereafter released on bond.

In June 1983, the case proceeded to trial. Petitioner waived the second paragraph and proceeded to the jury only on the capital murder charge. The defense, simply stated, was that Respondent was in Missouri at the time of the commission of the alleged offense, as substantiated by numerous independent witnesses and documents. The jury was submitted a charge which allowed a conviction on a theory of individual OR party liability. A general verdict of guilty was returned and after affirmative answers to special issues were returned, a verdict of death was assessed on July 8, 1983. Respondent was taken into custody and has been on death row at the

Texas Department of Corrections since on or about July 8, 1983.

The mandatory appeal dictated by Article 37.071, Vernon's Ann. C.C.P. was pursued. In February 1985, Respondent's current counsel became involved in the case. At that point in time, no brief had yet been filed on behalf of Respondent due to massive delays in the preparation of the record on appeal.

On April 18, 1985, Respondent, with leave of court, timely filed a 156 page brief containing 63 grounds of error.

On April 4, 1986, almost one year later, Petitioner filed its 41 page response.

On May 20, 1986, Respondent filed an 85 page supplemental brief.

On May 21, 1986, oral argument was presented to the Court of Criminal Appeals of Texas.

From May 1986 through November 1987, Respondent filed three post oral argument supplemental briefs and three motions to expedite disposition of the appeal by the Court of Criminal Appeals. The State did not file any documentation with the Court of Criminal Appeals other than its brief on April 4, 1986.

On December 13, 1989, the Court of Criminal Appeals delivered an opinion reversing the judgement and ordering the entry of a judgement of acquittal due to insufficient evidence to show Respondent guilty as an individual *or* as a party. See Pet. at A-1 to A-17.

On December 29, 1989, Petitioner untimely filed its motion for rehearing, a copy of which was attached as Exhibit 2 to Respondent's response to Petitioner's motion to stay issuance of mandate filed with this Court on or about July 16, 1990 (hereinafter referred to Respondent's response). See Pet. at B-1. See Rule 230, Texas Rules of Appellate Procedure.

On February 1, 1990, Respondent filed his response to Petitioner's motion for rehearing, a copy of which was attached as Exhibit 3 to Respondent's response filed with this Court on or about July 16, 1990.

On May 2, 1990, the Court of Criminal Appeals denied Petitioner's motion for rehearing. See Pet. at C-1.

Pursuant to Orders of the Court of Criminal Appeals, the mandate of the Court of Criminal Appeals was stayed from May 16, 1990, until July 23, 1990. On or about July 16, 1990, Respondent, in anticipation that Petitioner would file a motion to stay (and due to the anticipated absence from the state of Respondent's counsel) filed with this Court his response to Petitioner's motion to stay issuance of mandate (hereinafter referred to as Respondent's response). On or about July 20, 1990, Petitioner filed its motion to stay issuance of mandate and petition for writ of certiorari. On July 23, 1990, Mr. Justice White granted Petitioner's motion to stay.

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. THIS COURT DOES NOT HAVE JURISDICTION.

"Petitioner's claim is based on the Fourteenth Amendment to the United States Constitution". Pet. at 2. Petitioner also asserts jurisdiction under 28 U.S.C. Section 1257(a). Pet. at 2.

Assuming, *arguendo*, that Petitioner is referring to the due process clause of the Fourteenth Amendment, it should be pointed out that nothing contained therein affords the State of Texas due process of law. Indeed, the Fourteenth Amendment is a limitation on the actions of the State of Texas. And, under *Collier v. Poe*, 732 S.W.2d 332, 344 (Tex. Cr. App. 1987), appeal dismissed, ___ U.S. ___, 108 S.Ct. 51 (1987) [dismissed for want of substantial federal question, which is a ruling on the merits], the State of Texas is not entitled to due process of law. Petitioner's reliance upon the Fourteenth Amendment is seriously misplaced.

Furthermore, 28 U.S.C. Section 1257(a) provides that this Court has jurisdiction to review, via writ of certiorari, a decision of the Court of Criminal Appeals where:

> " . . . the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

Clearly, the validity of a treaty or statute of the United States is not in question. Similarly, no statute of the State of Texas is involved in this case. Finally, Petitioner (as demonstrated in the second through sixth reasons in support of a denial of the writ) failed in the state court to specially set up or claim any title, right, privilege or immunity under the Constitution of the United States. *See Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981)[Mr. Justice White, speaking for the Court, noted that petitioner failed to properly raise or preserve a federal question in the Georgia courts and that the petition for writ of certiorari must be dismissed due to that failure]. Respondent respectfully submits that jurisdiction over the instant petition for writ of certiorari does not exist and that the petition for writ of certiorari should be denied.

2. PETITIONER PROCEDURALLY BYPASSED THE COURT OF CRIMINAL APPEALS BY FAILING TO PRESENT IN ANY MANNER, IN ITS RESPONSE BRIEF, THE QUESTION PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI.

The "question presented" is:

> "Whether the Texas Court of Criminal Appeals has misapplied the Rule of Jackson v. Virginia 443 U.S. 307 (1979) by holding that the prosecution is under an affirmative duty to disprove every hypothesis except that of guilt beyond a reasonable doubt." Pet. at i.

Petitioner has complied with Rule 21.1(h) of the Rules of this Court by stating, pet. at 2, that "in this motion for rehearing the state specifically alleged that the Texas Court of Criminal Appeals had misapplied the rule

of Jackson v. Virginia, 443 U.S. 307 (1979)". Although Respondent contends that Petitioner did not raise the "question presented" in its motion for rehearing (see number 3, *infra*), Petitioner's statement is an undeniable concession that Petitioner failed to present the "question presented" at any point in time prior to the motion for rehearing. Respondent asserts that this concession and the ramifications thereof justify a denial of certiorari.

Petitioner had the clear opportunity to raise the "question presented" in the Court of Criminal Appeals. In Respondent's opening brief, the standard of review was stated to be the following with respect to the grounds of error addressed by the Court of Criminal Appeals in its opinion:

> "Under *Jackson v. State*, 672 S.W.2d 801, 803 (Tex. Cr. App. 1984), the standard of review is that set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). In applying that test, this Court has agreed that the 'exclusion of outstanding reasonable hypotheses' test is still applicable. Id. at 803 citing *Denby v. State*, 654 S.W.2d 457 (Tex. Cr. App. 1983)." (as to liability as the sole actor: Ground of Error No. 7; Respondent's brief at pages 25-26)
>
> "Thus, while the circumstances are suspicious, a jury is not allowed to convict on speculation, *Jackson v. State*, 536 S.W.2d 371, 375 (Tex. Cr. App. 1976), and suspicion does not justify an affirmance by this Court; only proof beyond a reasonable doubt. *Waldon v. State*, 579 S.W.2d 499 at 502 (Tex. Cr. App. 1979). (as to liability as a party; Ground of Error No. 6; Respondent's brief at page 23).

In Petitioner's brief filed in response to Respondent's opening brief, Petitioner totally failed to set forth any

standard of review, let alone present to the Court of Criminal Appeals any assertion that the standard cited to it by Respondent was inconsistent with *Jackson v. Virginia, supra*. Petitioner's brief at pages 5 to 23. In fact, Petitioner only cited one case: *Rodriguez v. State*, 496 S.W.2d 46 (Tex. Cr. App. 1973), which addressed knowledge and control over narcotic drugs and did not address, directly or indirectly, the "question presented" in Petitioner's submission to this Court. Accordingly, Petitioner failed to afford the Court of Criminal Appeals the opportunity to pass upon the question it has presented to this Court. The failure to afford the Court of Criminal Appeals an opportunity to pass upon the question it seeks this Court to review is a procedural bypass of the Court of Criminal Appeals. *See Bloeth v. New York*, 369 U.S. 133, 82 S.Ct. 661, 7 L.Ed. 2d 780 (1962) [Mr. Justice Harlan, on application for stay of execution, stated that "it appears on the face of the present application that the two questions proposed for review were not raised in the Court of Appeals until the second motion for reargument. In such circumstances it is clear that this Court would be without jurisdiction to consider them]; *Webb v. Webb, supra* [outlining policy reasons why a petitioner must present to the state court the question he desires to present on certiorari or appeal]. Petitioner's procedural default justifies the denial of certiorari.

3. PETITIONER PROCEDURALLY BYPASSED THE COURT OF CRIMINAL APPEALS BY FAILING TO PRESENT, ON MOTION FOR REHEARING, THE QUESTION PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI.

Respondent contends that Petitioner's assertion that it raised the precise "question presented" in its motion for rehearing, Pet. at 2, is inaccurate, lacking in candor, and directly contrary to the record. Petitioner did not raise the "question presented" and has thus failed to present the issue to the Court of Criminal Appeals and has procedurally bypassed its opportunity to complain to this Court.

In Petitioner's motion for rehearing to the Court of Criminal Appeals, Petitioner presented four points of error, as follows:

> "Point of Error Number One: The Court erred in holding that the reasonable hypothesis of the Appellant must be excluded to a moral certainty."
>
> "Point of Error Number Two: The hypothesis relied on by the Court i.e., that another unbeknownst to the Appellant committed the offense, is not a reasonable hypothesis."
>
> "Point of Error Number Three: The facts of the instant case are distinguishable from *Nathan* and *Flores* and the evidence is sufficient to uphold the conviction."
>
> "Point of Error Number Four: It is proper to uphold Appellant's conviction based on his status as a party."

See Petitioner's motion for rehearing, contained in Exhibit 2 to Respondent's response to Petitioner's motion

to stay issuance of mandate filed with this Court on or about July 16, 1990.

Under Point of Error Number One in its motion for rehearing, (i.e., Exhibit 2 attached to Respondent's response at page 3), Petitioner stated the following to the Court of Criminal Appeals:

> "The proper standard to apply in circumstantial evidence cases has known no little argument. *Butler v. State*, 769 S.W.2d 234 (Tex. Crim. App. 1989). *The current accepted status of the test holds that there are two components: first* that " . . . after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979); and *second, "A conviction based on circumstantial evidence must exclude every other reasonable hypothesis except the guilt of the accused* . . . It is not required that the circumstance should, to a moral certainty, actually exclude every hypothesis that the act may have been committed by another person, *but that the hypothesis is a reasonable one consistent with the circumstances and the facts proved* . . . Each fact need not point directly and independently to the guilt of the accused, as the cumulative effect of all the incriminating facts may be sufficient to support the evidence." *Carlsen v. State*, 654 S.W.2d 444, 447 (Tex. Cr. App. 1983); *Bulter, supra* 238 footnote 1. *The second step in this application, the exclusion of the reasonable hypothesis, is well settled in Texas Criminal Jurisprudence, and is "implicit" in any review based on Jackson. Bulter supra, id."* (emphasis added)

Thus, in its motion for rehearing, Petitioner was NOT COMPLAINING THAT THE COURT OF CRIMINAL

APPEALS HAD MISAPPLIED *JACKSON V. VIRGINIA, supra,* but was complaining *only* about the application of a standard that, under *state law,* contained a "moral certainty" component. Accordingly, Petitioner's statement, Pet. at 2, that "in this motion for rehearing the state specifically alleged that the Texas Court of Criminal Appeals had misapplied the rule of Jackson v. Virginia, 443 U.S. 307 (1979)", is inaccurate, lacking in candor and directly contrary to the express wording of its motion for rehearing. Indeed, Petitioner failed to present to the Court of Criminal Appeals the "question presented" in the petition for writ of certiorari and thus procedurally bypassed its right to present the "question presented". *See Bloeth v. New York, supra; Webb v. Webb, supra.* Petitioner's procedural default justifies the denial of certiorari.

4. PETITIONER SHOULD BE ESTOPPED FROM PRESENTING THE "QUESTION PRESENTED" TO THIS COURT SINCE PETITIONER REPRESENTED TO THE COURT OF CRIMINAL APPEALS THAT THE UTILIZATION OF THE "EXCLUSION OF OUTSTANDING REASONABLE HYPOTHESIS TEST" WAS PROPER AND WELL ESTABLISHED UNDER STATE LAW AND IMPLICIT IN ANY REVIEW BASED ON JACKSON V. VIRGINIA.

As reflected above in the quotation from Petitioner's motion for rehearing to the Court of Criminal Appeals, (see Exhibit 2 attached to Respondent's response at page 3), Petitioner affirmatively stated that the utilization of the "exclusion of outstanding reasonable hypothesis test" was proper, well established under state law, and implicit in any review based on *Jackson v. Virginia, supra.*

In its petition for certiorari, Petitioner has not only disregarded its previous representations to the Court of Criminal Appeals, Petitioner has also affirmatively misled this Court concerning what it did in fact represent to the Court of Criminal Appeals. It bears repeating: Petitioner's motion for rehearing did not allege that the Court of Criminal Appeals had misapplied *Jackson v. Virginia, supra,* contrary to the assertions of Petitioner. See Pet. at 2. Any cursory review of the motion for rehearing will reflect the accuracy of this statement.

Notions of comity indicate that this Court should not review matters which were not presented to the Court of Criminal Appeals. *Webb v. Webb, supra.* Furthermore, Petitioner's express representations contained in its motion for rehearing concerning the propriety of the "exclusion of outstanding reasonable hypothesis test" should be held as inconsistent with its position at trial and on appeal. Under the ruling in *Steagald v. United States,* 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981), the Government may not raise issues before this Court:

> " . . . when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation." *Id.,* at 1646.

Cf. Wilson v. State, 692 S.W.2d 661 (Tex. Cr. App. 1984) [citing and following *Steagald*]. Since Petitioner actually affirmatively represented that the standard utilized (i.e., "the exclusion of outstanding reasonable hypothesis test") was well settled in " . . . Texas Criminal Jurisprudence and is 'implicit' in any review based on *Jackson* . . . ", Petitioner should not now be allowed to assert

otherwise. This change in position did not afford the Court of Criminal Appeals an opportunity to address, directly or indirectly, the question presented in its certiorari petition, and therefore, this Court should deny certiorari.[1]

5. PETITIONER'S COMPLAINT TO THE COURT OF CRIMINAL APPEALS REGARDING THE EXCLUSION OF REASONABLE HYPOTHESIS TO A "MORAL CERTAINTY" DID NOT PRESERVE PETITIONER'S RIGHT TO SEEK THIS COURT'S REVIEW OF THE "QUESTION PRESENTED".

Petitioner's complaint in its motion for rehearing regarding the exclusion of all reasonable hypothesis to a "moral certainty" did not include, directly or indirectly, any complaint that the Court of Criminal Appeals had

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[1] Petitioner mentioned the "question presented" *only after* the Court of Criminal Appeals denied Petitioner's motion for rehearing on May 2, 1990. In Petitioner's first motion for stay, filed with the Court of Criminal Appeals on or about May 5, 1990 (see Exhibit 5 to Respondent's July 16, 1990, submission to this Court opposing Petitioner's anticipated motion for stay), Petitioner asked the Court to stay the execution of the mandate because: "The petition for review to this Court presents a substantial federal question: Whether the Texas Court of Criminal Appeals has misapplied the United States Supreme Court ruling in Jackson v. Virginia (citation omitted) and it's progeny by using an incorrect standard in analyzing the sufficiency of evidence in a circumstantial evidence case". It should be noted that Petitioner did not, in that stay document, even point out *how* the Court of Criminal Appeals had allegedly misapplied the rule of *Jackson v. Virginia*. Furthermore, Petitioner did not file a second motion for rehearing asking the Court of Criminal Appeals to consider that question.

misapplied the standard of *Jackson v. Virginia, supra.* Even a cursory review of Petitioner's motion for rehearing will reveal the accuracy of this statement.

Also, as noted in Respondent's response to Petitioner's motion for rehearing (contained in Exhibit 3 attached to Respondent's response filed with this Court on or about July 16, 1990), the opinion of the Court of Criminal Appeals did not *actually* employ a test whereby all reasonable hypothesis were excluded to a moral certainty. As stated by Respondent (see Exhibit 3 at pages 13-14):

> " . . . the plain language of the opinion in this case indicates that an exclusion to a moral certainty "test" was not ACTUALLY employed by the Court. There were three portions of the opinion regarding the standard of review governing the Court's analysis of the evidence in this case. In order of appearance, they are as follows:
>
> > (1) "In both circumstantial evidence and direct evidence cases the standard by which evidence is reviewed is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Houston v. State, 663 S.W.2d (Tex. Cr. App. 1984); Carlsen v. State, 654 S.W.2d 444 (Tex. Cr. App. 1983); Bulter v. State, 759 S.W.2d 234, 238 (Tex. Cr. App. 1989). In Denby v. State, 654 S.W.2d 457, 464 (Tex. Cr. App. 1983) (Opinion on Rehearing), this Court noted that 'if the evidence supports an inference other than the guilt of the appellant, a finding of guilt beyond a reasonable doubt is not a rational finding.' Proof which amounts to only a strong suspicion or mere probability is insufficient. It is

the appellate courts' function to ensure that no one is convicted of a crime except on proof beyond a reasonable doubt."

"After viewing the evidence in the light most favorable to the verdict, as we are constrained to do, Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979), we find that we agree with appellant as to both points. Although there is plentiful evidence to show that appellant made numerous threats against the victim and that two weeks before the offense he was in possession of materials similar to those used in the commission of the offense, we find no evidence which connects appellant with the actual setting of the bomb, nor is there any evidence showing that he solicited, encouraged, directed, aided or attempted to aid another to place the bomb. V.T.C.A., Penal Code, Section 7.02(a)(2). The evidence, even when viewed in the light most favorable to the verdict, suggests at least one hypothesis other than the guilt of appellant: that is, that someone else unbeknownst to appellant committed the offense". Slip op. at 9-10.

(2) "Although the evidence against appellant leads to a strong suspicion or probability that appellant committed this capital offense, we cannot say that it excludes to a moral certainty every other reasonable hypothesis except appellant's guilt. Nathan v. State, 611 S.W.2d (Tex. Cr. App. 1981); Flores v. State, 551 S.W.2d 364 (Tex. Cr. App. 1977). Specifically, there remains the outstanding possibility that someone other than appellant committed the offense." Slip op. at 14.

> (3) "We see no difference between *Nathan. Flores* and the instant case. Although this Court does not relish the thought of reversing the conviction in this heinous case and ordering an acquittal, because the evidence does not exclude every other reasonable hypothesis, we are compelled to do so. The judgement is reversed and an order of acquittal is entered. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); Green v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978)." Slip op at 16.
>
> The first and third references do not contain any mention of the 'moral certainty' test. Only the second reference contains a reference to the 'moral certainty' test, and the second reference is not the 'holding' of the opinion."

Accordingly, it is clear that Petitioner's complaint on motion for rehearing did not preserve the question which Petitioner seeks this Court to review. *Cf. Bloeth v. New York, supra; Webb v. Webb, supra.* Certiorari should be denied.

6. THE STANDARD OF REVIEW UTILIZED BY THE COURT OF CRIMINAL APPEALS HAS BEEN UTILIZED IN TEXAS FOR OVER 100 YEARS AND THIS COURT SHOULD NOT REVIEW A DECISION BASED ON AN ADEQUATE AND INDEPENDENT STATE LAW BASIS.

As reflected above in the quotation from Petitioner's motion for rehearing, Petitioner conceded in his motion for rehearing that the standard employed by the Court of Criminal Appeals is well settled in Texas jurisprudence. Accordingly, Petitioner's assertion that the opinion rested primarily upon federal law and that an independent state

law ground was not apparent from the four corners of the opinion, pet. at 4, is not well taken. Indeed, Petitioner's concession in its motion for rehearing that the test is well settled in Texas jurisprudence should estop it from asserting that an adequate and independent state law basis does not exist, particularly given Petitioner's failure to present the "question presented" to the Court of Criminal Appeals (which failure denied the Court of Criminal Appeals a concrete reason and opportunity to clarify, if it did not, the fact that the test employed was premised on over 100 years of well settled state law).

The existence of an adequate and independent state law basis for the decision of the Court of Criminal Appeals clearly indicates that review by this Court would be inappropriate. And, there can be no question that it is a state law standard. See also *Montgomery v. State*, ___ S.W.2d ___ (No. 1090-88; delivered May 30, 1990) (McCormick, Presiding Judge, for the Court, stated that "Texas law" dictates that outstanding reasonable hypothesis inconsistent with guilt have to be considered on appeal where insufficient evidence has been alleged).

The "exclusion of outstanding reasonable hypothesis test" utilized by the Court of Criminal Appeals in this case has been utilized in Texas for over 100 years. See 24 Tex. Jur. 2d, Evidence, Section 742, p. 422, cited with approval in *Flores v. State*, 551 S.W.2d 364 (Tex. Cr. App. 1977) (one of the cases cited by the Court of Criminal Appeals in the instant opinion). Indeed, at page 423 of this volume of Texas Jurisprudence, the following statement is made:

> "In felony cases, specially where death sentence has been imposed, appellate court rigorously

> insists on moral certainty of guilt of one convicted on circumstantial evidence". (citing sixteen Texas cases going back to 1869)

Indeed, the first case cited at page 422 after this quotation is *Perkins v. State*, 32 Tex. 110 (*1869*), where the Court,in a noncapital felony, stated:

> " . . . in all trials for felony, involving the liberty or the life of a party, the circumstances to show the guilt of the party charged, must be of a conclusive nature and tendency. Wherever any other hypothesis can be predicated on the facts proved, consistent with the innocence of the party accused, it would be tyranny, oppression and the grossest injustice, to demand a victim to expiate an offense against the law from such uncertain demonstrations by the evidence . . . And unless there were sufficient circumstances, developed by the testimony, to fix a rational conviction in the mind that it was the one, rather than the other (i.e., one person who might have stole the property as opposed to another who might have stole the property), neither the verdict nor the judgment ought to be permitted to stand." (explanation added).

Similarly, in *Kunde v. State*, 3 S.W. 325 (Tex.Ct.App. 1886), the Court stated:

> "The twenty-second assignment of error calls in question the sufficiency of the evidence to support the conviction. Circumstantial evidence alone is relied upon by the state to sustain the conviction. After very careful and repeated examination of the evidence as presented in the statement of facts, we unhesitatingly say that to our minds it is wholly insufficient to warrant the conviction. There are but few circumstances which tend even remotely to prove this defendant's connection with the murder, and none of

> these inculpatory circumstances are at all inconsistent with his innocence, nor are any of them incapable of explanation upon any other hypothesis but that of his guilt. Taken altogether, the circumstances are far from being of a conclusive nature. They do not lead the mind to a satisfactory conclusion, and do not produce a reasonable and moral certainty of the defendant's guilt; in other words the evidence, being wholly circumstantial, is not of that force, certainty, and conclusiveness demanded by the law in support of a conviction for felony. Pogue v. State, 12 Tex. App. 283; Lovelady v. State, 14 Tex. App. 545; Rye v. State, 8 Tex. App. 153; Hunt v. State, 7 Tex. App. 235; Robertson v. State, 10 Tex. App. 602; Black v. State, 1 Tex. App. 369; Barnes v. State, 41 Tex. 342."

Clearly, the "exclusion of outstanding reasonable hypothesis test" has been a consistent and uniform aspect of Texas law for over 100 years. Petitioner's efforts to convince this Court that there was no clear indication that the opinion of the Court of Criminal Appeals rests on an adequate and independent state law ground, Pet. at 4, n.1, is not well taken given the historical background of the "exclusion of outstanding reasonable hypothesis test" in Texas, Petitioner's concession in his motion for rehearing that it is a well settled portion of Texas jurisprudence, and the reliance of the Court of Criminal Appeals upon *Flores v. State, supra,* which was decided well before *Jackson v. Virginia, supra.* Even Judge Berchelmann, who dissented with written opinion, utilized the "exclusion of reasonable hypothesis test". Pet. at A-17. And, it should be recalled Texas is free to afford more protection to its citizens than that amount mandated by the Constitution

of the United States. Clearly, this is what Texas has done as a matter of state law.

Furthermore, Respondent would point out that under the Eighth and Fourteenth Amendments, a heightened scrutiny of the evidence on appeal -- which is what Petitioner is attempting to complain about -- is not appropriate in a capital case. Denial of certiorari is appropriate.

7. GRANTING THE PETITION FOR WRIT OF CERTIORARI WOULD VIOLATE RESPONDENT's RIGHTS AGAINST DOUBLE JEOPARDY, AS GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In *Fong Foo v. United States*, 369 U.S. 141, 82 S.Ct. 671, ___ L.Ed.2d ___ (1962), this Court held, in essence, that once a verdict of acquittal is entered, no matter how egregiously erroneous the foundation therefor, the double jeopardy clause of the Fifth Amendment would prevent review of that acquittal and a retrial.

Respondent believes that under more recent pronouncements of this Court, see e.g., *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), there is indeed a serious question of whether this Court can review a state court judgment of acquittal without violating the double jeopardy clause of the Fifth Amendment.[2]

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[2] Respondent recognizes that *Burks* does not affirmatively answer this question, but his interpretation of *Burks* is consistent with *Fong Foo, supra*. Respondent also acknowledges that *Burks, supra* at 5, noted that "[t]he United States has not cross-petitioned for certiorari on the question of whether the Court

(Continued on following page)

Indeed, the bottom line of Petitioner's request is to obtain another bite at the apple: to obtain a third opportunity to convince the Court of Criminal Appeals that the evidence was sufficient for any rational trier of fact to have found Respondent guilty as an individual actor or as a party. The Court of Criminal Appeals, in its original opinion, held that no rational trier of fact could have found Respondent guilty under either theory. The State then sought a second bite at the apple in its motion for rehearing, which the Court of Criminal Appeals rejected. Now, Petitioner wants this Court to order the Court of Criminal Appeals to again consider the sufficiency of the evidence. This action violates the Fifth Amendment's bar against double jeopardy and runs counter to notions of comity. Certiorari should be denied.

(Continued from previous page)

of Appeals was correct in holding that the Government had failed to meet its burden of proof with respect to the claim of insanity. Accordingly, that issue is not open for review here".

Of course, in *Burks*, the defendant had raised a prima facie defense of insanity and the government had failed to fulfill its burden to effectively rebut that insanity, which is different from a situation where, as in the present case, the prosecution has failed to meet its burden of production and persuasion regarding the elements of the offense. In this regard, Respondent herein moved for an instructed verdict at the close of the prosecutions' case R. XX – 550-558, at the close of all of the evidence, R. XXIII – 970-971, in his motion for new trial, R. I – 83-88, and in his first amended motion for new trial, R. I 89-95. All of these efforts to obtain a ruling of insufficient evidence contained the same grounds as reflected in Respondent's brief to the Court of Criminal Appeals (Grounds of Error Nos. 1, 2, 5, 6, and 7).

8. THE JUDGMENT OF ACQUITTAL WAS PROPERLY ENTERED BY THE COURT OF CRIMINAL APPEALS OF TEXAS.

In a well reasoned opinion authored by Presiding Judge McCormick, the Court of Criminal Appeals held that the evidence was insufficient for any rational trier of fact to have found Respondent guilty as an individual actor or as a party. Respondent begs this Court to read his motion for rehearing attached to Respondent's response filed with this Court on July 16, 1990. That motion for rehearing, along with the original brief of Respondent at grounds of error six and seven, unequivocally demonstrate that the Court of Criminal Appeals was correct when it held that the evidence was insufficient.

Two brief excerpts and one comment from that motion for rehearing are appropriate. First, as reflected at page 5 of Respondent's motion for rehearing:

> " . . . at the hearing on the motion for new trial, the State did not even argue that the evidence was sufficient to show individual liability, only party liability. See R. XXVI-124, L. 2-13, apparently made in response to the Court's comments at R.XXVI-99, L. 8-22.
>
> Also, the State has ignored the fact that the trial judge found there was no evidence to show Appellant was in Odessa at the time of the commission of the offense and the conviction had to be made on the law of parties. R. XXVI-99, L. 8-15 (hearing on motion for new trial and amended motion for new trial)."

Second, as reflected at pages 8 to 9 of Respondent's motion for rehearing:

"The State has failed to prove the preliminary facts essential to a finding that Appellant was involved in the bombing. At pages 26-27 of his original brief on appeal, Appellant noted that:

"The State failed to establish when the vehicle was last driven by anyone on Friday, April 23, 1982, and that Appellant did in fact place an explosive weapon on the vehicle after it was last driven. Indeed, the State was so enthralled with the various threats made by Appellant that it failed to introduce evidence, if it existed, that Appellant: (1) knew where Joe Neal lived; (2) knew that Joe Neal drove a pickup truck, let alone what type and color of truck and/or the license number of that truck; and (3) knew that Joe Neal parked that truck in the Furr's parking lot. In this connection, not only did the State fail to elicit evidence to these necessary facts, the State declined the opportunity to cross-examine Appellant on them. (11)"

> (11) The State did cross-examine Appellant as to whether he knew where Joe Neal was working in late 1980, and Appellant was not sure. R.XXII-829. The vehicle which was blown up was a 1982 pickup. R.XVII-15. There is no evidence Appellant had ever seen Joe Neal in that vehicle or knew that it was driven by Joe Neal. The State and the jury simply assumed Appellant knew this as well as the location where Joe Neal lived as of April 24, 1982. This may explain the State's failure to introduce evidence of ownership, as demonstrated in GROUND OF ERROR NO. 5

"Without evidence of Appellant's knowledge of these elementary facts, the jury could not have logically found that Appellant would have been able to personally place the explosive weapon

> on the vehicle. No one testified that Appellant had any personal contact with Joe Neal after Neal left Husky in 1980. Too, no one testified that Appellant, at any time, drove by Neal's house or was at Neal's house at any time. Similarly, the State failed to produce any evidence that Appellant was in Odessa on April 23, 1982, after the vehicle was 'finally, parked and thus had an *opportunity* to place the explosive weapon on the vehicle before 7:30 a.m. on April 24, 1982."

The comment is as follows: As reflected at pages 10 to 12 of the motion for rehearing, Petitioner also ignored the evidence developed on a motion for new trial which showed that the State of Texas had suppressed evidence which showed that there was a reasonable doubt that two men other than Respondent were involved in the bombing.

In light of the contents of the motion for rehearing, it is understandable why the Court of Criminal Appeals rejected Petitioner's pleas for rehearing. Simply stated, no rational trier of fact could have found Respondent committed the offense and the Court of Criminal Appeals properly entered an acquittal.

9. APPLICATION OF THE EXCLUSION OF OUTSTANDING REASONABLE HYPOTHESIS TEST IS NOT A CONSTITUTIONAL VIOLATION.

Petitioner attempts to insinuate that application of the exclusion of outstanding reasonable hypothesis test is a constitutional violation. In addition to the comments stated above regarding the lack of jurisdiction and the lack of any constitutional right to which Petitioner is

entitled, it should be noted that neither *Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954) nor *Jackson v. Virginia, supra* held as unconstitutional a standard of appellate review based on the exclusion of outstanding reasonable hypothesis. Indeed, *Holland, supra.* addressed the trial court's failure to instruct the petite jury that in assessing the government's case, it must exclude every reasonable hypothesis other than guilt. The Court stated:

> "There is some support for this type of instruction in the lower court decisions . . . (citations omitted), but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect."

Similarly, in *Jackson* this Court rejected the "no evidence" rule of *Thompson v. Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960) and set forth the rule to be applied by federal judges reviewing state sufficiency challenges via federal habeas corpus. In applying that rule (i.e., whether any rational trier of fact could have found every element of the offense beyond a reasonable doubt), the Court held the evidence sufficient and noted, in passing, that:

> "Only under a theory that the prosecution was under an affirmative duty to rule out *every hypothesis* except that of guilt beyond a reasonable doubt could this petitioner's challenge be sustained. That theory the Court has rejected in the past. *Holland v. United States* (citation omitted). We decline to adopt it today." (emphasis added)

The Court in *Jackson*, it should be noted, cited Holland. but omitted a critical word: "REASONABLE". *Jackson*

thus rejected the notion that the prosecution must rule out *every* hypothesis except guilt, but it did not necessarily reject the notion that the prosecution must rule out every *REASONABLE* hypothesis but guilt. And certainly there is nothing in *Holland* or *Jackson* that would indicate a constitutional violation if a state court uses a standard more favorable to the citizen accused.[3] Certiorari should be denied.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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[3] Contrary to the express wording of *Holland*, the jury was not instructed (let alone properly instructed) on the standards for reasonable doubt. See Respondent's Supplemental Brief at page 55 (Ground of Error No. 67), filed on May 20, 1986.

(3)

No. 90-139

In The

Supreme Court of the United States

October Term, 1990

THE STATE OF TEXAS,

Petitioner,

vs.

JOHN SKELTON,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

RESPONDENT JOHN SKELTON'S SUPPLEMENTAL BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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No. 90-139

In The

Supreme Court of the United States

October Term, 1990

THE STATE OF TEXAS,

Petitioner,

vs.

JOHN SKELTON,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

RESPONDENT JOHN SKELTON'S SUPPLEMENTAL BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

This supplemental brief is being submitted due to the following inadvertent error. On August 29, 1990, counsel for Respondent received a letter from counsel for Petitioner concerning Respondent's brief in opposition. Counsel for Respondent investigated the assertions of the letter and came to the realization, for the first time, that the copy of the State's motion for rehearing in the Court of Criminal Appeals which was available to him at the

time of the preparation of Respondent's brief in opposition did not contain all of the pages contained in the State's motion for rehearing. Due to that error, counsel for Respondent realized, to his ultimate embarrassment and horror, that the second, third and fourth reasons in opposition to the writ of certiorari contained in Respondent's brief inadvertently contained inaccurate assertions.

Counsel for Respondent immediately contacted co-counsel for Petitioner, Mr. Michael Griffin, and discussed the matter. Counsel for Respondent apologized to Mr. Griffin and informed Mr. Griffin that a supplemental brief would be filed to rectify the inadvertent error. Mr. Griffin acknowledged that he understood that the error had been inadvertent. Counsel for Respondent then called Mr. Chris Vasil and notified him on August 29, 1990, of the situation. Mr. Vasil assured counsel for Respondent that the inadvertent error could in fact be rectified by a supplemental brief. A letter confirming this conversation was sent to Mr. Vasil and to Mr. Griffin on August 29, 1990. Counsel for Respondent apologizes to the Court and to Petitioner for the error.

In light of the foregoing, the second, third and fourth reasons proffered by Respondent in his brief in opposition, pages 6 to 13, should be disregarded by this Court and the following second, third and fourth reasons substituted in lieu thereof. The first, fifth, sixth, seventh, eighth and ninth reasons in opposition to the petition for writ of certiorari contained in Respondent's brief in opposition are unaffected by the error.

REASONS FOR DENYING THE WRIT OF CERTIORARI

2. PETITIONER PROCEDURALLY BYPASSED THE COURT OF CRIMINAL APPEALS BY FAILING TO PRESENT IN ANY MANNER, IN ITS RESPONSE BRIEF, THE QUESTION PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI.

The "question presented" is:

> "Whether the Texas Court of Criminal Appeals has misapplied the Rule of Jackson v. Virginia, 443 U.S. 307 (1979) by holding that the prosecution is under an affirmative duty to disprove every hypothesis except that of guilt beyond a reasonable doubt." Pet. at i.

Petitioner has complied with Rule 21.1(h) of the Rules of this Court by stating, pet. at 2, that "in this motion for rehearing the state specifically alleged that the Texas Court of Criminal Appeals had misapplied the rule of *Jackson v. Virginia*, 443 U.S. 307 (1979)". Although Respondent contends that Petitioner did not adequately preserve the "question presented" in its motion for rehearing (see number 3, *infra*), Petitioner's statement is an undeniable concession that Petitioner failed to present the "question presented" at any point in time prior to the motion for rehearing. Respondent asserts that this concession and the ramifications thereof justify a denial of certiorari.

Petitioner had the clear opportunity to raise the "question presented" in the Court of Criminal Appeals. In Respondent's opening brief, the standard of review was stated to be the following with respect to the grounds of error addressed by the Court of Criminal Appeals in its opinion:

> "Under *Jackson v. State*, 672 S.W.2d 801, 803 (Tex. Cr. App. 1984), the standard of review is that set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). In applying that test, this Court has agreed that the 'exclusion of outstanding reasonable hypotheses' test is still applicable. Id. at 803 citing *Denby v. State*, 654 S.W.2d 457 (Tex. Cr. App. 1983)." (as to liability as the sole actor: Ground of Error No. 7; Respondent's brief at pages 25-26)

> "Thus, while the circumstances are suspicious, a jury is not allowed to convict on speculation, *Jackson v. State*, 536 S.W.2d 371, 375 (Tex. Cr. App. 1976), and suspicion does not justify an affirmance by this Court; only proof beyond a reasonable doubt. *Waldon v. State*, 579 S.W.2d 499 at 502 (Tex. Cr. App. 1979)." (as to liability as a party; Ground of Error No. 6; Respondent's brief at page 23).

In Petitioner's brief filed in response to Respondent's opening brief, Petitioner totally failed to set forth any standard of review, let alone present to the Court of Criminal Appeals any assertion that the standard cited to it by Respondent was inconsistent with *Jackson v. Virginia, supra*. Petitioner's brief at pages 5 to 23. In fact, Petitioner only cited one case: *Rodriquez v. State*, 496 S.W.2d 46 (Tex. Cr. App. 1973), which addressed knowledge and control over narcotic drugs and did not address, directly or indirectly, the "question presented" in Petitioner's submission to this Court. Accordingly, Petitioner failed to afford the Court of Criminal Appeals the opportunity to pass upon the question it has presented to this Court. The failure to afford the Court of Criminal Appeals an opportunity to pass upon the question it seeks this Court to review is a procedural bypass of the Court of Criminal

Appeals. *See Bloeth v. New York*, 369 U.S. 133, 82 S.Ct. 661, 7 L.Ed.2d 780 (1962) [Mr. Justice Harlan, on application for stay of execution, stated that "it appears on the face of the present application that the two questions proposed for review were not raised in the Court of Appeals until the second motion for reargument. In such circumstances it is clear that this Court would be without jurisdiction to consider them"]; *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981) [outlining policy reasons why a petitioner must present to the state court the question he desires to present on certiorari or appeal]. Petitioner's procedural default justifies the denial of certiorari.

3. PETITIONER PROCEDURALLY BYPASSED THE COURT OF CRIMINAL APPEALS BY FAILING TO PRESENT, ON MOTION FOR REHEARING, ANYTHING BUT A CURSORY SUGGESTION THAT THE COURT HAD MISAPPLIED JACKSON V. VIRGINIA.

Respondent contends that Petitioner procedurally bypassed its opportunity to complain to this Court by virtue of its failure to properly brief the issue in its motion for rehearing to the Court of Criminal Appeals. At page 10 of the State's Motion For Rehearing, Petitioner stated, as its entire position and "brief", the following:

> "Without waiving the foregoing the State respectfully urges that the Court has misapplied the teaching of *Jackson*, supra, by embracing the 'exclusion of reasonable hypothesis rule' whether as rule of law or analytical construct. It is the holding of the United States Supreme Court that the rule has no application under the *Jackson* standard. Rather than adopt the standard espoused by the Supreme Court's opinion

> the Court has applied this rule in, as Justice McCormick notes in Butler, *supra* at 244, in a 'disturbingly selective' fashion. There should be but one standard in circumstantial evidence cases and the analysis used should not depend upon the type or severity of the offense."

In Petitioner's motion for rehearing to the Court of Criminal Appeals, Petitioner presented five points of error, as follows:

> "Point of Error Number One: The Court erred in holding that the reasonable hypothesis of the Appellant must be excluded to a moral certainty."
>
> "Point of Error Number Two: The hypothesis relied on by the Court, i.e., that another unbeknownst to the Appellant committed the offense, is not a reasonable hypothesis."
>
> "Point of Error Number Three: The facts of the instant case are distinguishable from *Nathan* and *Flores* and the evidence is sufficient to uphold the conviction."
>
> "Point of Error Number Four: It is proper to uphold Appellant's conviction based on his status as a party."
>
> "Point of Error Number Five: The Court has incorrectly applied the Rule of Jackson v. Virginia."

See Petitioner's motion for rehearing, contained in Exhibit 2 to Respondent's response to Petitioner's motion to stay issuance of mandate filed with this Court on or about July 16, 1990.

Under Point of Error Number One in its motion for rehearing, (i.e., Exhibit 2 attached to Respondent's

response at page 3), Petitioner stated the following to the Court of Criminal Appeals:

> "The proper standard to apply in circumstantial evidence cases has known no little argument. *Butler v. State*, 769 S.W.2d 234 (Tex. Crim. App. 1989). *The current accepted status of the test holds that there are two components: first* that " . . . after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979); and *second, "A conviction based on circumstantial evidence must exclude every other reasonable hypothesis except the guilt of the accused* . . . It is not required that the circumstance should, to a moral certainty, actually exclude every hypothesis that the act may have been committed by another person, *but that the hypothesis is a reasonable one consistent with the circumstances and the facts proved . . . Each fact need not point directly and independently to the guilt of the accused, as the cumulative effect of all the incriminating facts may be sufficient to support the evidence." Carlsen v. State*, 654 S.W.2d 444, 447 (Tex. Cr. App. 1983); *Butler*, **supra** 238 footnote 1. *The second step in this application, the exclusion of the reasonable hypothesis, is well settled in Texas Criminal Jurisprudence, and is "implicit" in any review based on* **Jackson**, *Butler supra, id."* (emphasis added)

Thus, in its motion for rehearing, Petitioner first took the position that the standard employed by the Court of Criminal Appeals was a matter of state law and that the Court had incorrectly utilized as part of that state law standard the "moral certainty" component. The State then took an alternative and inconsistent position that the

Court had misapplied this Court's standard of *Jackson*, but did so without adequate, let alone full, briefing and argument. Indeed, as reflected in the quotation reflecting the State's entire position on rehearing, the State did not even mention a constitutional provision or attempt to set up any claim under any constitutional provision. Under state law, the failure to properly and adequately brief and argue this "point of error" was a procedural default in the Court of Criminal Appeals. See *McWherter v. State*, 607 S.W.2d 531 at 536 (Tex. Cr. App. 1980); *McCambridge v. State*, 712 S.W.2d 499 at 501 n.9 (Tex. Cr. App. 1986). *See also Bloeth v. New York, supra; Webb v. Webb, supra.* Petitioner's procedural default justifies the denial of certiorari.

4. PETITIONER SHOULD BE ESTOPPED FROM PRESENTING THE "QUESTION PRESENTED" TO THIS COURT SINCE PETITIONER REPRESENTED TO THE COURT OF CRIMINAL APPEALS THAT THE "EXCLUSION OF OUTSTANDING REASONABLE HYPOTHESIS TEST" WAS PROPER AND WELL ESTABLISHED UNDER STATE LAW AND IMPLICIT IN ANY REVIEW BASED ON JACKSON V. VIRGINIA.

As reflected above in the quotation from Petitioner's motion for rehearing to the Court of Criminal Appeals, (see Exhibit 2 attached to Respondent's response at page 3), Petitioner affirmatively stated that the utilization of the "exclusion of outstanding reasonable hypothesis test" was proper, well established under state law, and implicit in any review based on *Jackson v. Virginia, supra.*

Notions of comity indicate that this Court should not review matters which were not FULLY AND FAIRLY

presented and briefed to the Court of Criminal Appeals. *Webb v. Webb, supra.* Furthermore, Petitioner's express representations contained in its motion for rehearing concerning the propriety of the "exclusion of outstanding reasonable hypothesis test" should be held as inconsistent with its position at trial and on appeal. Under the ruling in *Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981), the Government may not raise issues before this Court:

> " . . . when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation." *Id.*, at 1646.

Cf. Wilson v. State, 692 S.W.2d 661 (Tex. Cr. App. 1984) [citing and following *Steagald*]. Since Petitioner actually affirmatively represented that the standard utilized (i.e., "the exclusion of outstanding reasonable hypothesis test") was well settled in " . . . Texas Criminal Jurisprudence and is 'implicit' in any review based on *Jackson* . . . ", Petitioner should not now be allowed to assert otherwise. This change in position did not afford the Court of Criminal Appeals an opportunity to address, directly or indirectly, the question presented in its certiorari petition, and therefore, this Court should deny certiorari.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays that in light of the nine reasons submitted in Respondent's brief (i.e., reasons 1, and 5 through 9) and in Respondent's supplemental brief (i.e., substituted reasons 2, 3 and 4), this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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(4)

No. 90-139

In The

Supreme Court of the United States

October Term, 1990

THE STATE OF TEXAS,

Petitioner,

v.

JOHN SKELTON,

Respondent.

REPLY BRIEF IN SUPPORT FOR PETITION OF WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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QUESTION PRESENTED

I. WHETHER THE TEXAS COURT OF CRIMINAL APPEALS HAS MISAPPLIED THE RULE OF JACKSON V. VIRGINIA 443 U.S. 307 (1979) BY HOLDING THAT THE PROSECUTION IS UNDER AN AFFIRMATIVE DUTY TO DISPROVE EVERY HYPOTHESIS EXCEPT THAT OF GUILT BEYOND A REASONABLE DOUBT.

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REPLY BRIEF IN SUPPORT FOR PETITION OF WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES THE STATE OF TEXAS, Petitioner herein, by and through the District Attorney of Ector County, Mr. Gary P. Garrison, and files this Reply Brief in Support of Petition for Writ of Certiorari to the Texas Court of Criminal Appeals pursuant to Rule 15.6 of the Supreme Court Rules.

REASONS FOR GRANTING THE WRIT

1. JURISDICTION IS PROPER IN THIS COURT.

Respondent avers that this Court does not have jurisdiction over this cause because the facts and procedural

standing of the case are not within the purview of 28 U.S.C. Section 1257(a). Here reliance is misplaced.

Petitioner has always maintained that this Court has jurisdiction pursuant to the "plain statement doctrine." As discussed in the original petition for writ of certiorari filed in this cause there are no independent state grounds and the decision of the Texas Court of Criminal Appeals appears to rest primarily on Federal grounds or to be interwoven with Federal grounds. These facts are sufficient to trigger the Court's Jurisdiction under 28 U.S.C. 1257(a). *Montana v. Hall,* 481 U.S. 400 (1987) f.n. 3. This Court has jurisdiction over the cause.

2. THE QUESTION PRESENTED IN PETITIONER PETITION FOR WRIT OF CERTIORARI HAS BEEN PROPERLY PRESENTED.

Respondent alleges in his amended Brief in Opposition that because the question presented was not specifically addressed in the Appellee's Brief in the Court of Criminal Appeals that the issue was "bypassed". Here reliance is misplaced.

As noted by Respondent the issue was formally raised in the States' Motion for Rehearing before the Texas Court of Criminal Appeals. The fact that the question presented was not raised in precise terms in the original briefs before the Texas Court of Criminal Appeals is not a bar to Jurisdiction.

It has long been the rule that this jurisdictional requirement is satisfied only if the record shows that the Federal question has been presented for decision to the highest court of the state or has in fact been decided by it, and that its decision was necessary to the judgement. *Wilson v. Cook,* 327 U.S. 472, 794 (1946); *Nickey v. Mississippi,* 292 U.S. 393, 394 (1934). In the instant case, it is

readily apparent that the issue has been decided by the Texas Court of Criminal Appeals. The Court invoked the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979) and misapplied that standard knowing that the vitality of the "exclusion of outstanding reasonable hypothesis test" was in doubt. This contention is illustrated by Respondent's own words. "Under *Jackson v. State*, 672 S.W. 2d 801, 803 (Tex. Crim. App. 1984), the standard of review is that set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *In applying that test, this Court has agreed that the 'exclusion of outstanding reasonable hypotheses' test is still applicable.*" (Respondent's brief before the Texas Court of Criminal Appeals at page 23) (Emphasis ours). The issue was clearly before the court, was decided by the court, and necessary to the determination of the judgment.

Further, Petitioner contends that it should be entitled to rely on the proper Constitutional standard in a court's deliberation. The Texas Court of Criminal Appeals misapplied the standard enumerated in *Jackson*, supra, and the State responded as soon as practicable.

3. PETITIONER'S MOTION FOR REHEARING ADEQUATELY ADDRESSED THE INSTANT CONSTITUTIONAL ISSUE AND THE QUESTION PRESENTED.

Respondent's contention is without merit. A review of Petitioner's point of error five in the motion for rehearing before the Texas Court of Criminal Appeals illustrates that the very heart of the question presented was briefed and presented. The two opinions relied on in this Honorable Court were cited and argued in that point of error. The Petitioner specifically set out the Constitutional error. *McWherter v. State*, 607 S.W. 2d 531 (Tex. Crim. App. 1980)

and *McCambridge v. State*, 712 S.W. 2d 499 (Tex. Crim. App. 1986) are inapposite.

4. ARGUING ALTERNATIVE THEORIES OR POINTS OF LAW DOES NOT ESTOP PETITIONER FROM PRESENTING THE QUESTION PRESENTED.

Here Respondent confuses advocacy with a form of factual estoppel. The reticence of the Texas Court of Criminal Appeals to allow a review of its decisions by other tribunals is notorious. *White v. State*, 543 S.W. 2d 366 (Tex. Crim. App. 1976) (holding that a writ of certiorari to the Texas Court of Criminal Appeals by the state is legally impossible). With the foregoing in mind logic and advocacy dictate that Petitioner's first attack should be on the state rule.

Petitioner's first point of error addressed the fact that the rule had been utilized in Texas for a long period of time. In the final point of error Petitioner pointed out the Constitutional infirmities of the rule. There is no prohibition against attacking a rule of law on both State and Federal grounds.

Reliance on *Stegald v. United States*, 451 U.S. 204 (1981) is misplaced. The holding there concerns the government acquiescence in a factual finding by the court below, not an attack based on both state and federal law. The argument was proper and there is no estoppel.

5. THE QUESTION PRESENTED IS PRESERVED.

Even a cursory reading of motion for rehearing shows that the Petitioner objected to the use of the "exclusion of the reasonable hypothesis rule."

> "Without waiving the foregoing the State respectfully urges that the Court has misapplied the teaching of *Jackson*, supra, by embracing the

> 'exclusion of reasonable hypothesis rule' whether as rule of law or analytical construct. It is the holding of the United States Supreme Court that the rule has no application under the *Jackson* standard. Rather than adopt the standard espoused by the Supreme Court's opinion the Court has applied this rule in, as Justice McCormick notes in Butler, *supra* at 244, in a 'disturbingly selective' fashion. There should be but one standard in circumstantial evidence cases and the analysis used should not depend upon the type or severity of the offense."

Respondent's complaint that the Petitioner did not state its Constitutional objection to the use of the test in *any manner* is without merit. The fifth point of error clearly states that the rule has *no application* under *Jackson*, supra. The question presented is preserved.

6. THE OPINION OF THE TEXAS COURT OF CRIMINAL APPEALS WAS NOT BASED ON AN ADEQUATE AND INDEPENDENT STATE LAW BASIS.

Respondent mischaracterizes the holding of *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983) by confusing history with the "plain statement" doctrine. In *Long* this Court held,

> "It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions. Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the Federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did

> because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached."

In the instant case, the Texas Court of Criminal Appeals was "constrained" to follow *Jackson* (Appendix A-8, Petition for Writ of Certiorari to the Texas Court of Criminal Appeals). The Texas Court of Criminal Appeals opinion was based primarily on Federal law and is interwoven with Federal law. The fact that the "exclusion of reasonable hypothesis test" is well settled in Texas Jurisprudence and has been extant for one hundred years in no way diminishes the fact that the Court of Criminal Appeals acknowledged that the *Jackson* standard is the controlling rule of law in sufficiency of evidence cases and that the Court felt "constrained" to follow it.

An adequate and independent state law basis is not apparent from the face of the opinion.

7. GRANTING THE PETITION FOR WRIT OF CERTIORARI WOULD NOT VIOLATE RESPONDENT'S RIGHTS AGAINST DOUBLE JEOPARDY.

8. THE JUDGEMENT OF ACQUITTAL WAS NOT PROPERLY ENTERED.

Prior to 1979, the test for an appellate determination of the sufficiency of the evidence was whether, viewed in the light most favorable to the verdict, there was *any* evidence which, if believed, showed the guilt of the accused. This rule applied in both Federal and Texas Jurisprudence. *Thompson v. Louisville,* 362 U.S. 199 (1960); *Banks v. State,* 510 S.W. 2d 592 (Tex. Crim. App. 1974).

This standard was commonly referred to as the "no evidence" standard.

Until 1978, a reversal for insufficiency of evidence in Texas (under the "no evidence" standard) did not warrant acquittal. Cases were remanded for retrial. *Phillips v. State*, 297 S.W. 2d 134 (Tex. Crim. App. 1957). Pursuant to this Court's decision in *Burks v. United States*, 437 U.S. 1 (1978) the Texas Court of Criminal Appeals entered judgement of acquittals where there was "*no evidence*" to support the conviction. *Roberts v. State*, 571 S.W. 2d 10 (Tex. Crim. App. 1978). *Kunde v. State*, 3 S.W. 2d 325, 332 (Tex. Ct. App. 1886).

Thus, prior to 1978, an appellate finding that there was an "outstanding reasonable hypothesis other than guilt" did not mandate an entry of an order of acquittal.

In 1979, this court's decision in *Jackson*, supra brought the demise of the "no evidence" standard in favor of the now well known standard, viewing the evidence in a light most favorable to the verdict could a rational trier of fact have found every element of the offense beyond a reasonable doubt. In *Jackson*, this Court rejected the motion that the state was under an affirmative duty to rebut all reasonable hypothesis except the guilt of the defendant, and that circumstantial cases required a higher or different burden of proof. The Court further held that a Court faced with conflicting inferences must presume that the trier of fact resolved these conflicts in favor of the state.

Respondent contends that the omission of the word "reasonable" before the word "hypothesis" means that this Court still requires the state to exclude all *reasonable* hypothesis is not well taken. "The evidence need not exclude every *reasonable* hypothesis except that of guilt. *Tibbs v. Florida*, 475 U.S. 31, 38 (1982) at f.n. 11.

From the foregoing it is apparent that neither this Court nor the Constitution of the United States requires acquittal merely because there is an appellate finding of an outstanding reasonable hypothesis other than the guilt of the defendant.

In the instant case, the Texas Court of Criminal Appeals expressed its displeasure at having to reverse "the conviction in this heinous case and ordering an acquittal . . . " because the evidence did not exclude every other reasonable hypothesis, and stated that they were compelled to do so under the rule of *Burks*, supra.

The Texas Court of Criminal Appeals having invoked *Jackson*, supra, and *Burks*, supra, erred by holding that these opinions mandated acquittal. Arguendo sufficient evidence of Respondent's guilt was presented with the exception of an outstanding reasonable hypothesis no Constitutional Jeopardy question was reached.

9. APPLYING THE EXCLUSION OF OUTSTANDING REASONABLE HYPOTHESIS TEST IS A CONSTITUTIONAL VIOLATION.

The rule of *Jackson* is the Constitutional standard for evidentiary review. To misapply this Court's holding in reviewing a cause is a violation of *Jackson* and the pronouncements of this Court, the arbiter of the Constitution. Petitioner respectfully urges it has the right to rely and follow the Court's ruling, *Long*, supra.

10. THE SAME ISSUE PRESENTED IN THE PETITIONER'S PETITION FOR WRIT OF CERTIORARI IS NOW BEFORE THE TEXAS COURT OF CRIMINAL APPEALS.

Pursuant to Rule 15.7 of the Supreme Court Rules the Petitioner wishes to respectfully bring to the Court's attention to *State of Texas v. Geesa*, No. 0290-90 (1990).

In *Geesa* the Ft. Worth Court of Appeals reversed the jury verdict of a Texas trial Court and ordered an acquittal on the basis of insufficient proof (Appendix A-1). The offense alleged was the Unauthorized Use of a Motor Vehicle. The Ft. Worth Court of Appeals found that there was insufficient evidence that the Appellant operated the Motor Vehicle.

The Texas Court of Criminal Appeals has granted the States Petition for Discretionary Review to review the following issues:

1. Whether there was sufficient circumstantial evidence that Appellant operated the vehicle in question.

2. Whether *Jackson v. Virginia*, 443 U.S. 307 (1979), requires that the prosecution's proof, when reviewed on appeal, exclude every reasonable hypothesis of innocence.

3. Whether the Court should overrule language in *Butler v. State*, 769 S.W.2d 234 (Tex. Crim. App. 1989), and other previous decisions, holding that the reasonable-hypothesis-of-innocence analysis is a proper "analytical construct" for applying the sufficiency of evidence test enunciated in *Jackson v. Virginia*.

The order granting review is attached as Appendix B-1. The Brief on the Merits for the State of Texas to the Texas Court of Criminal Appeals is attached as Appendix C-1.

The petitioner herein respectfully urges that the outcome of *Geesa* is material to the adjudication of the instant cause. In the event that the Texas Court of Criminal Appeals recognizes its error in misapplying the *Jackson* standard of review the State prays that the instant cause be remanded with instructions to the Texas Court of Criminal Appeals for consideration under the proper standard of review. In the event that the Texas Court of

Criminal Appeals persists in its erroneous misapplication of *Jackson*, the State prays that its Petition for Writ of Certiorari to the Texas Court of Criminal Appeals be granted and this Honorable Court intervene to prevent the repetition of error.

Petitioner further requests that this Honorable Court maintain Jurisdiction over the instant cause pending resolution of *Geesa*.

CONCLUSION

For these reasons the petitioner prays that the Court maintain Jurisdiction over the instant cause to prevent the repetition of error and that the Petition for Writ of Certiorari to the Texas Court of Criminal Appeals be granted.

Respectfully submitted,

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APPENDIX A

NO 2-88-140-CR

COURT OF APPEALS

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH

Douglas Alan Geesa	)	From the Criminal
vs.	)	District Court
	)	No. 2 of Tarrant
The State of Texas	)	County (0313898R)
	)	February 21, 1990
	)	Opinion by Justice Farris
	)	(NFP)

JUDGMENT

This Court has considered the record on appeal in this cause and is of the opinion that there was error in the judgment of the trial court.

It is the order of this Court that the judgment of the trial court be reversed and remanded with instructions to enter a judgment of acquittal and that this decision be certified below for observance.

/s/ DFF

REVACO CRmj

NO. 2-88-140-CR

COURT OF APPEALS

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH

DOUGLAS ALAN GEESA

APPELLANT

VS.

THE STATE OF TEXAS

STATE

FROM CRIMINAL DISTRICT COURT
NO. 2 OF TARRANT COUNTY

OPINION

Douglas Alan Geesa, appellant, was convicted by a jury of unauthorized use of a motor vehicle, *see* TEX. PENAL CODE ANN. sec. 31.07(a) (Vernon 1989), and sentenced to forty years confinement in the Texas Department of Corrections. We sustain his complaint on appeal that the evidence was insufficient to support his conviction, reverse the judgment of the trial court, and remand the case to the trial court with an instruction to enter a judgment of acquittal.

In considering Geesa's insufficient evidence points, we must review the entire body of evidence to determine whether the State has proved every element of the alleged crime beyond a reasonable doubt. *See Butler v.*

State, 769 S.W.2d 234, 239 (Tex.Crim.App. 1989). An essential element of the offense is that Geesa operated the motor vehicle. *See Jackson v. State*, 645 S.W.2d 303, 305-06 (Tex.Crim.App. 1983). After reviewing all of the evidence in the light most favorable to the State, we hold that the evidence that Geesa operated the motor vehicle is insufficient to sustain his conviction.

The State introduced the evidence of three witnesses to establish the identity of the unauthorized driver of the motor vehicle, a pickup. The witnesses were: Guy Baird, whose attention was drawn to the pickup by its unexplained and suspicious appearance at a closed Texaco service station; Leroy Pierce, the arresting officer; and Stewart Mark Brozgold, a Crime Scene Investigator for the Arlington Police Department. Officer Pierce testified that he responded to a radio dispatch by driving to the Texaco service station where he saw Geesa standing in the company of another Arlington police officer. Officer Pierce observed the pickup engine was hot, as if it had just been driven, and that Geesa matched the radio-dispatched description of the driver he was given, that of a white male wearing a white tee shirt and cream-colored pants. The description apparently was given by Baird, who called the Arlington Police Department when he became concerned with the pickup's presence at the Texaco service station located approximately 150 ft. from his place of employment at 3:30 a.m. Baird did not recall giving the police dispatcher a description of the driver. He testified that it was dark and he was unable to identify Geesa as either of the pickup's two occupants.

Brozgold testified he found several packages of cigarettes on the left side of the dash above the steering

wheel and he was able to identify fingerprints found on the cigarette packages as Geesa's. According to Pierce, Geesa denied any knowledge of the pickup truck, claiming that he had walked to the station and was there to collect discarded items, although the items found on his person had apparently been stolen from the Texaco service station. Although the police dispatcher reported two suspects were involved, only Geesa was apprehended.

Although it is clear from the evidence that Geesa was in some way involved with the presence of the pickup at the Texaco service station, and it appears he might very well have been charged with burglary or theft, we hold the evidence is insufficient to prove the essential element of operation of a motor vehicle. Geesa is incriminated by his statements to the officer, which are inconsistent with the cigarette packages found in the interior of the truck. However, his conduct and the fact that the cigarettes were found inside the pickup, although certain proof of his involvement with the truck, create only a strong suspicion or mere probability of his guilt of the offense charged and such will not support his conviction on appeal. *See Avina v. State*, 751 S.W.2d 318, 320 (Tex.App. - Fort Worth 1988, pet. ref'd).

The State urges that the similarity between the manner in which Geesa was clothed at the time of his arrest and the description of the driver's clothing contained in the police dispatch is sufficient when coupled with the other evidence to identify Geesa as the driver, relying on the Court of Criminal Appeals opinion in *Bonner v. State*, 640 S.W.2d 601, 603 (Tex.Crim.App. [Panel Op.] 1982). The facts of *Bonner* are easily distinguishable from the

present case. *Bonner* was convicted of burglary of a vehicle following his arrest by a security guard at an automobile dealership. The security guard first observed Bonner at a distance of 6 to 12 ft., and although he was unable to see Bonner's face, he "observed carefully what the man was wearing." *Id.* at 602. Minutes later he arrested Bonner and at trial testified that Bonner "was dressed identically to the person he had earlier observed. . . . " When first observed, Bonner appeared to be jacking up a pickup truck from which, the witness later discovered, the front and right rear tires and the spare tire had been removed. In contrast, Pierce had only testified that Geesa's attire matched the description given by the dispatcher as to the white tee shirt and the cream-colored pants.

Because we find that a rational trier of fact could not have excluded every reasonable hypothesis except Geesa's guilt, we reverse the trial court's judgment and remand the case to the trial court with instructions to enter a judgment of acquittal. *See Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *also Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978).

/s/ David F. Farris
David F. Farris,
Justice

PANEL B
FARRIS, LATTIMORE, AND MEYERS, JJ.
DO NOT PUBLISH
TEX. R. APP. P. 90(e)
FEB 21 1990

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

May 23, 1990

RE: Case No. 0290-90
STYLE: Geesa, Douglas Alan

JUSTICE COA: 02-88-00148-CR

MAY 23'90

0.15

On this day, the State's Petition for Discretionary Review has been GRANTED. Oral argument, if desired, must be requested BY LETTER WITHIN 30 DAYS. An original and ten copies of the State's Brief must be filed with this Court within 30 days. The Appellant's brief is due 30 days after the timely filing of the State's brief.

ENTERED MAY 25 1990

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
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FILE COPY

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APPENDIX C

DOUGLAS ALAN GEESA, APPELLANT	§	
V.	§	NO. 0290-90.
THE STATE OF TEXAS, APPELLEE	§	

ON STATE'S PETITION FOR DISCRETIONARY REVIEW OF CAUSE NUMBER 02-88-0140-CR IN THE COURT OF APPEALS FOR THE SECOND APPELLATE DISTRICT OF TEXAS, FORT WORTH, TEXAS, REVERSING THE CONVICTION IN CAUSE NUMBER 0313898R IN THE CRIMINAL DISTRICT COURT NUMBER TWO OF TARRANT COUNTY, TEXAS; THE HONORABLE L. CLIFFORD DAVIS, JUDGE PRESIDING.

§ § §

STATE'S BRIEF ON THE MERITS

§ § §

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NAMES OF ALL PARTIES

Douglas Alan Geesa

The State of Texas

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3. Whether the Court should overrule language in Butler v. State, 769 S.W.2d 234 (Tex. Crim. App. 1989), and other previous decisions, holding that reasonable-hypothesis-of-innocence analysis is a proper "analytical construct" for applying the sufficiency test enunciated in Jackson v. Virginia.

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IN THE

COURT OF CRIMINAL APPEALS OF TEXAS

DOUGLAS ALAN GEESA, APPELLANT	§ §	
V.	§ §	NO. 0290-90
THE STATE OF TEXAS, APPELLEE	§ §	

STATE'S BRIEF ON THE MERITS

TO THE COURT OF CRIMINAL APPEALS OF TEXAS:

STATEMENT OF THE CASE

A jury convicted Appellant of unauthorized use of a vehicle and, after finding that he had two previous felony convictions, set his punishment at confinement for 40 years. The Fort Worth Court of Appeals, in an opinion by Justice David Farris, reversed and ordered an acquittal on the basis of insufficient proof that Appellant operated the vehicle. *Geesa v. State*, #2-88-140-CR (Tex. App. ___ Fort Worth; Feb. 21, 1990)(unpublished).

QUESTIONS FOR REVIEW

1. Whether there was sufficient circumstantial evidence that Appellant operated the vehicle in question.

2. Whether *Jackson v. Virginia*, 443 U.S. 307 (1979), requires that the prosecution's proof, when reviewed on appeal, exclude every reasonable hypothesis of innocence.

3. Whether the Court should overrule language in *Butler v. State*, 769 S.W.2d 234 (Tex. Crim. App. 1989), and other previous decisions, holding that reasonable-hypothesis-of-innocence analysis is a proper "analytical construct" for applying the sufficiency test enunciated in *Jackson v. Virginia*.

FACTUAL SUMMARY

Store clerk Guy Baird's suspicions were aroused when a light-colored pickup pulled into the driveway of a closed Texaco service station around 3:00 a.m. From his vantage point across the street, Mr. Baird saw the pickup stay parked for about 10 or 15 minutes and then back toward the service bays. He saw the two occupants of the pickup move about in front of the station. One was wearing dark-colored clothing and the other light-colored clothing. Mr. Baird called the police and described what he "saw out there," but he could not remember what he told the police dispatcher concerning the driver's description.[1] R. V – 35-38, 42.

When Officer Leroy Pierce arrived at the Texaco station following a radio dispatch, he found that another officer had already responded and was standing with Appellant. R. V – 48-49. Appellant told Officer Pierce that he had never seen the truck before and that he was picking up discarded items from the station. R. V – 57.

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[1] The opinion of the Court of Appeals recites that Mr. Baird "did not recall giving the police dispatcher a description." Slip opin., p.3. Baird said only that he could not remember exactly what he said. R. V – 38.

The pickup engine was hot, there were 10 full quarts of Texaco oil in the bed of the pickup, and Appellant was carrying a quart of Texaco oil and a quart of Texaco transmission fluid. R. V – 49-50, 57. The service station's display rack had been stripped of its oil. R. V – 51.

A second radio transmission advised Officer Pierce that the caller (obviously Mr. Baird) said the driver wore a white T-shirt and cream-colored pants. R. V – 54. That is what Appellant had on. R. V – 54.

Appellant's fingerprints were on three packages of cigarettes found in the pickup on the left side of the dash above the steering wheel. R. V – 94-96.

The pickup had been stolen some 3½ weeks earlier; Appellant had no permission to use it. R. V – 17, 19, 21, 50. The other occupant of the pickup was never apprehended. R. V – 53.

TERMINOLOGY

Part of the accepted procedure in sufficiency analysis is to view the evidence "in the light most favorable to the verdict." In this brief we will often describe that favorable view of the evidence as "the State's evidence." We recognize, however, that such evidence may have originated with a defense witness.

We also use "trier of fact" and "jury" interchangeably, though the trial judge will of course be the trier of fact in some cases.

SUMMARY OF THE ARGUMENT

On review of the sufficiency of the evidence to support a criminal conviction, the question is " . . . whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

Although this Court has repeatedly acknowledged that *Jackson v. Virginia* contains the ultimate test for the sufficiency of the evidence, the Court also maintains that reasonable-hypothesis-of-innocence analysis is a proper "analytical construct" to facilitate the application of the *Jackson* test where the conviction is based on circumstantial evidence. In other words, if the appellate court determines that circumstantial evidence, when viewed in the light most favorable to the State, contains a reasonable explanation inconsistent with guilt, the evidence is insufficient and the defendant is entitled to an acquittal. *E.g.*, *Carlsen v. State*, 654 S.W.2d 444, 449 (Tex. Crim. App. 1983); *Butler v. State*, 769 S.W.2d 234, 238 n.1 (Tex. Crim. App. 1989).

The Court's use of the analytical construct is wrong.

First, reasonable-hypothesis analysis conflicts directly with the command of *Jackson v. Virginia*, and labeling that analysis a "construct" does not make the conflict disappear. *Jackson v. Virginia* asks only whether *any* rational fact-finder could have concluded that the defendant was *guilty* beyond a reasonable doubt. When this Court asks itself whether the evidence, even viewed

in the light most favorable to the State, discloses a reasonable hypothesis inconsistent with guilt, it is asking whether any trier of fact could have rationally found the defendant *innocent*. Stated another way, the construct asks whether *every* rational trier of fact would have been compelled to convict under the evidence viewed most favorably to the State, while *Jackson* asks only whether *any* trier could have rationally convicted. In short, the construct turns the *Jackson* test on its head.

Second, and this reason is intertwined with the first, the construct distorts the constitutional meaning of proof beyond a reasonable doubt and fails to respect the division of labor between trier of fact and reviewing court. The only proper question is whether *the trier of fact* could have been rationally convinced that the defendant was guilty beyond a reasonable doubt. That a different jury or a majority of an appellate court might have acquitted even under the most favorable view of the State's evidence does not mean there was a failure of proof in the constitutional sense. *See Johnson v. Louisiana*, 406 U.S. 356, 362-63, 92 S.Ct. 1620, 1624-25, 32 L.Ed.2d 152 (1972). If an appellate court must order an acquittal because it perceives a reasonable hypothesis of innocence, even when there is also a reasonable hypothesis of guilt, the court inevitably assumes the role of a 13th and deciding juror. *Cf. Blankenship v. State*, 780 S.W.2d 198 (Tex. Crim. App. 1989). Whether there is a reasonable hypothesis of innocence is solely a question for the jury. The only constitutional role of the reviewing court is to decide whether there is rational support for the guilty verdict.

Third, reliance on the construct continues to imply that circumstantial and direct evidence are inherently

different and that the former is less trustworthy. This distinction between direct and circumstantial evidence has been rejected by the Court in all other contexts, and there is no reason to retain it in one area. *See generally, Hankins v. State*, 646 S.W.2d 191 (Tex. Crim. App. 1983).

Finally, the decided trend among the states is to reject the reasonable-hypothesis construct as an appellate test, and all federal lower federal courts have rejected it. Moreover, this Court's own decisions in analogous areas support abandonment of the construct.

ARGUMENT AND AUTHORITIES

I. THE FEDERAL CONSTITUTIONAL BACKGROUND

The Due Process Clause of the Fourteenth Amendment protects a criminal defendant from conviction except on proof beyond a reasonable doubt of every element of the crime. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Even after *Winship* was decided, many federal courts still assumed that the no-evidence test of *Thompson v. Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960), applied to appellate review of the sufficiency of the evidence, so that as long as the jury was properly instructed on the reasonable-doubt standard, the evidence was sufficient if there was "any" or "some" evidence to support the verdict. *See Jackson v. Virginia*, 99 S.Ct. at 2787. Texas also followed an "any evidence" test at the time. *E.g., Banks v. State*, 510 S.W.2d 592, 595 (Tex. Crim. App. 1974). However, in *Jackson v. Virginia*, the Supreme Court rejected the *Thompson* doctrine as inadequate to protect against misapplication of the reasonable-doubt standard. Instead, the

focus of appellate review is on whether the record could reasonably (i.e., rationally) support a finding of guilt beyond a reasonable doubt. *Jackson v. Virginia*, 99 S.Ct. at 2788-89. The relevant question is not whether the reviewing court believes the evidence established guilt beyond a reasonable doubt, but

> . . . whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson v. Virginia, 99 S.Ct. at 789 (emphasis in original).

Although *Jackson v. Virginia* technically concerned only federal habeas review of a state conviction, its test for reviewing evidentiary sufficiency is the minimally acceptable test that courts may use consistent with the Due Process Clause. 99 S.Ct. at 2789 n.12; *see Carlsen v. State*, 654 S.W.2d 444, 449 (Tex. Crim. App. 1983). Texas quickly fell in line, since its sufficiency review had been less stringent. *See generally Butler v. State*, 769 S.W.2d 234, 237-39 (Tex. Crim. App. 1989)(also see Judge Clinton's concurring opinion, which was expressly adopted by the majority. 769 S.W.2d at 238 n.1, 242-43).

II. STATE BACKGROUND – THE LAW OF CIRCUMSTANTIAL EVIDENCE

For many years, Texas treated direct and circumstantial evidence differently, requiring specific instructions concerning the jury's use of circumstantial evidence and evaluating circumstantial evidence less favorably during a sufficiency review. Most germane to this case, Texas

maintained that circumstantial evidence could not support a conviction unless that evidence excluded every reasonable hypothesis except guilt. *E.g., Flores v. State,* 551 S.W.2d 364 (Tex. Crim. App. 1977).

However, Texas began a retreat from these positions in *Hankins v. State,* 646 S.W.2d 191 (Tex. Crim. App. 1983). The Court rejected the need for a separate jury instruction concerning circumstantial evidence, reasoning that since circumstantial evidence was not inherently less trustworthy than direct evidence and since there was only a single standard of proof in a criminal case (proof beyond a reasonable doubt), an instruction on circumstantial evidence was valueless and invites confusion." 646 S.W.2d at 198-99.

Since there was no intrinsic difference in the value of direct and circumstantial evidence, the Court later concluded the same appellate test for sufficiency applied to both categories of evidence, and the appropriate test was that set out in *Jackson v. Virginia. E.g., Carlsen v. State,* 654 S.W.2d at 448-49; *Freeman v. State,* 654 S.W.2d 450 (Tex. Crim. App. 1983); *Denby v. State,* 654 S.W.2d 457 (Tex. Crim. App. 1983); *Houston v. State,* 663 S.W.2d 455 (Tex. Crim. App. 1984). In accord with its view that a single test for sufficiency existed, the Court rejected prior cases indicating that the sufficiency of circumstantial evidence was to be reviewed "in light of the presumption of innocence" and that a failure to call certain witnesses automatically rendered the evidence insufficient in so-called "weak circumstantial evidence" cases. See *Houston v. State,* 663 S.W.2d at 456, and *Chambers v. State,* 711 S.W.2d 240, 244-45 (Tex. Crim. App. 1986), respectively.

However, although the Court acknowledged that *Jackson v. Virginia* contained the "ultimate" standard for judging the sufficiency of the evidence, it held that the prior rule – whether the incriminating circumstantial evidence excluded every reasonable hypothesis except guilt – was a useful analytical guideline or construct for applying the *Jackson* test. *E.g., Carlsen v. State*, 654 S.W.2d at 449-50; *Jackson v. State*, 672 S.W.2d 801, 803 (Tex. Crim. App. 1984); *Butler v. State*, 769 S.W.2d at 238 n.1. This was appropriate because, according to the Court, " . . . if the evidence supports an inference other than the guilt of the appellant, a finding of guilt beyond a reasonable doubt is not a rational finding." *Carlsen v. State*, 654 S.W.2d at 449, and dissenting opinion by Judge McCormick, 654 S.W.2d at 450. Or, as stated in *Chambers v. State*, 711 S.W.2d at 245, it was appropriate because " . . . that is the same mental process that a rational trier of fact would employ in logically analyzing any circumstantial evidence case, weak or strong."

III. AN OVERVIEW OF THE PROBLEMS WITH THE REASONABLE-HYPOTHESIS CONSTRUCT

If we could collect all criminal cases, muster the best proof that the prosecution could offer in support of its charges, submit that proof to multiple juries, tell those juries they should assume that all of that evidence is truthful, and further advise them that they should give the evidence the greatest weight that logic and their understanding of human experience allow, common sense tells us the cases would fall into three broad categories:

(1) those in which the State's evidence was so overwhelming that *all* juries, acting rationally, would vote to convict under a reasonable doubt standard;

(2) those in which the State's evidence was so weak that *no* rational jury would vote to convict; and

(3) those in which the State's evidence fell somewhere in between – strong enough to convince some rational juries that the defendant was guilty beyond a reasonable doubt but not strong enough to convince all of them. Cases in category three would run the gamut from those in which almost all of the hypothetical juries convicted to those in which very few did.

Category three exists because of the diversity of human experience. We can posit situations in which all can agree on the relevant facts from which a conclusion must be drawn, and the rules of logic apply with equal force to us all. However, the conclusions which one may rationally draw depend on the weight given the facts. The weight we assign them is not a matter of logic, but experience, and turns on such factors as our values and our views of how the world works and what motivates people in certain situations. For these reasons, rational people can rationally disagree about the meaning of a given set of facts. This is true whatever the standard of proof required for a conclusion because of the varying weight given the facts by each individual's experience. A fact which is significant enough to satisfy one person of something beyond a reasonable doubt might, if considered by another with different life experiences, be insufficient to satisfy him even under a standard which requires only that the conclusion be more likely than not correct.

Only in the theoretical world of formal logic are absolute conclusions possible. Any legal rule predicated on the need for such certainty, such absolute agreement, will be doomed because the legal doctrine is at odds with the realities of the human condition.

To return to our three categories of proof, any legal system seeking to devise a rule specifying what quantum of proof would be sufficient to justify a criminal conviction would uphold convictions in category one and overturn those in category two. Those are the results reached by both *Jackson v. Virginia* and reasonable-hypothesis theory. The only significant debate concerns what to do with those cases falling in the middle – those in category three.

Jackson v. Virginia places a constitutional blessing on category three cases. This is a necessary consequence of the phrasing " . . . whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." The reasonable-hypothesis-of-innocence construct, however, necessarily excludes category three cases from those which may be upheld. The construct would uphold the conviction only in category one cases because only in that group is there *no* reasonable hypothesis of innocence. The construct, in other words, will sustain a conviction only if *every* rational trier of fact would have convicted.[2]

Thus, despite the Court's statements to the contrary in *Butler v. State*, *Carlsen v. State*, and many other cases,

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[2] For example, in *Chambers v. State*, 711 S.W.2d at 248, the Court upheld the sufficiency of the evidence because "reasonable minds can draw only one inference."

the *Jackson* test and the reasonable-hypothesis construct are not harmonious phrasings of the same rule. They are in sharp conflict. The construct holds the State to a higher burden than is constitutionally required and thus will cause the reversal of some cases – the category three cases – that would be eminently affirmable under *Jackson v. Virginia*.[3] *Carlsen, Butler,* and their progeny must be overruled to the extent of this conflict.

Moreover, there is no defensible basis for retaining reasonable-hypothesis analysis as a matter of state law. That analysis usurps the constitutional role of the jury as trier of fact. Under our system, juries are entrusted with the responsibility of deciding whether proof beyond a reasonable doubt exists. If an appellate court may reverse a conviction because *the court* discerns a reasonable hypothesis of innocence, even though by definition the evidence may also support a reasonable hypothesis of guilt, then the court inevitably takes on the role of a 13th and deciding juror. The only proper question for a reviewing court is whether *the jury could have* rationally convicted.

Before examining in more detail the origin and meaning of the Texas construct, we turn first to a fuller examination of *Jackson v. Virginia*. This will emphasize that the

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[3] Since both rules sustain the jury's guilty verdict in category one cases, those in which every rational jury would convict, the construct may be used to affirm a conviction without running afoul of *Jackson*. However, there appears to be no utility in invoking the construct there since it should always be easier to proceed directly to the basic and less stringent test, asking simply whether *any* rational trier of fact could have convicted.

State has not misinterpreted *Jackson* itself, give a fuller understanding of the Supreme Court's reasoning in *Jackson*, and provide a background for the argument that reasonable-hypothesis analysis is equally indefensible as an appellate test under state law.

IV. *JACKSON V. VIRGINIA* REJECTS REASONABLE-HYPOTHESIS ANALYSIS

A. THE OBVIOUS TEXTUAL CONFLICT

As the State has already discussed, reasonable-hypothesis analysis asks whether any rational jury could have acquitted, whereas the test of *Jackson v. Virginia* asks whether any rational jury could have convicted. The State is not the only entity to find these approaches inconsistent, based simply on a textual comparison of the tests. The Sixth Circuit addressed the question in *York v. Tate*, 858 F.2d 322 (6th Cir. 1988), *cert. denied*, 109 S.Ct. 1960 (1989). There, the federal district court applied reasonable-hypothesis analysis because the Ohio state courts used it. The Ohio doctrine was known as "the *Kulig* rule," referring to *State v. Kulig*, 37 Ohio St.2d 157, 309 N.E.2d 897 (1974). The Sixth Circuit rejected that approach, saying:

> . . . . By applying the *Kulig* rule, the district court turned the *Jackson* standard on its head. Rather than asking whether *any* reasonable juror could have found petitioner guilty, the district court considered whether any reasonable juror could have found the petitioner *not* guilty. . . . Such an analysis is totally at odds with the standard of review set forth by the Supreme Court in *Jackson*. . . .

York v. Tate, 858 F.2d at 330. *Accord*: *Laird v. Lack*, 884 F.2d 912, 914-15 (6th Cir. 1989).[4]

B. *JACKSON V. VIRGINIA*, BY THE REAFFIRMATION OF *HOLLAND V. UNITED STATES*, REJECTS REASONABLE-HYPOTHESIS ANALYSIS AS PART OF THE CONSTITUTIONAL TEST

In *Holland v. United States*, 348 U.S. 121, 140, 75 S.Ct. 127, 137-38, 99 L.Ed. 150 (1954), the Supreme Court rejected the notion that a federal criminal jury had to be instructed that a conviction could be returned on circumstantial evidence only if that evidence excluded every reasonable hypothesis other than guilt:

> Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against

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[4] Various state courts have similarly concluded that reasonable-hypothesis analysis is inconsistent with *Jackson v. Virginia*. *State v. Randles*, 115 Idaho 611, 768 P.2d 1344, 1346-47 (App. 1989), *aff'd*, 787 P.2d 1152, 1158 (Idaho 1990); *Hines v. State*, 58 Md.App. 637, 473 A.2d 1335, 1347-49 (Md. Ct. Spec. App. 1984); *State v. Buchanan*, 312 N.W.2d 684, 689 (Neb. 1981); *State v. Sutphin*, 107 N.M. 126, 753 P.2d 1314, 1318 (1988); *State v. Jones*, 303 N.C. 500, 279 S.E.2d 835, 837-38; *State v. Derouchie*, 140 Vt. 437, 440 A.2d 146, 148-50 (1981); *Poellinger v. State*, 153 Wis.2d 493, 451 N.W.2d 752, 757 (1990).

> the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.

Holland v. United States, 75 S.Ct. at 137-38.

Although the *Holland* Court assumed the jury needed to be properly instructed on reasonable doubt for this rule to apply, it did not seem to envision that any particular explanation of reasonable doubt was required since it remarked shortly thereafter that attempts to explain "reasonable doubt" do not usually make the concept clearer. 75 S.Ct. at 137-38. In other words, "proper instruction" likely meant only that the jury must be instructed that proof beyond a reasonable doubt is the standard of proof.

The Supreme Court had the opportunity to revisit *Holland* as it applied its new constitutional test in *Jackson v. Virginia*. In rejecting one of the defendant's arguments that he was entitled to an acquittal, the Court also rejected reasonable-hypothesis analysis:

> Only under a theory that the prosecution was under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt could this petitioner's challenge be sustained. **That theory the Court has rejected in the past.** *Holland v. United States*, [citation omitted]. **We decline to adopt it today.** Under the standard established in this opinion . . . , a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and we must defer to that resolution.

Jackson v. Virginia, 99 S.Ct. at 2792-93 (emphasis added).

In light of the underscored language, the State cannot agree with this Court's suggestion that the Supreme Court rejected reasonable-hypothesis analysis only "for its own reasons of practice." *Butler v. State*, 769 S.W.2d at 243 (concurring opinion, adopted by majority). Even if it might be argued that *Holland's* foundation was federal common law or the Supreme Court's supervisory powers, the rejection of reasonable-hypothesis analysis was unquestionably grounded on constitutional doctrine in *Jackson v. Virginia*.

C. THE TEST OF JACKSON V. VIRGINIA IS DRAWN FROM THE SUPREME COURT'S EARLIER DECISION IN JOHNSON V. LOUISIANA, WHICH REJECTS THE IDEA THAT A SET OF FACTS IS RATIONALLY SUSCEPTIBLE OF ONLY ONE INTERPRETATION BEYOND A REASONABLE DOUBT

The "overview" section of the argument explains how reasonable-hypothesis analysis will affirm a conviction only if *every* trier of fact would rationally convict. That view presupposes that proof beyond a reasonable doubt is an all-or-nothing proposition; if even one rational person, acting rationally, says he has a reasonable doubt about a matter, then it cannot be said that the matter has been satisfactorily established. That view of reasonable doubt was rejected under the federal constitution in *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972), and again in *Jackson v. Virginia*.

Let us again examine the text of *Jackson v. Virginia:*

> . . . the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Johnson v. Louisiana*, 406 U.S., at 362, 92 S.Ct., at 1624-1625.

Jackson v. Virginia, 99 S.Ct. at 2789. The referenced passages in *Johnson v. Louisiana* illuminate the *Jackson* test and make clear why "any" is underscored.

Johnson v. Louisiana upholds a Louisiana statute allowing a jury to convict an accused of certain felonies if at least nine of twelve jurors conclude the proof establishes guilt beyond a reasonable doubt. The defendant argued under the Due Process Clause that if three of twelve jurors voted to acquit, then necessarily his guilt had not been constitutionally proven beyond a reasonable doubt. In rejecting that argument, the Court said:

> Of course, the State's proof could perhaps be regarded as more certain if it had convinced all 12 jurors instead of only nine. It would have been even more compelling if it had been required to convince and had, in fact, convinced 24 or 36 jurors. But the fact remains that nine jurors – a substantial majority of the jury – were convinced by the evidence. In our view disagreement of three jurors does not alone establish reasonable doubt, particularly when such a heavy majority of the jury, after having considered the dissenters' views, remains convinced of guilt. **That rational men disagree is not in itself equivalent to a failure of proof by the State, nor does it indicate infidelity to the reasonable-doubt standard. Jury verdicts finding guilty beyond a reasonable doubt are regularly sustained even though the evidence was such**

> **that the jury would have been justified in having a reasonable doubt, [citations omitted]; even though the trial judge might not have reached the same conclusion as the jury, [citation omitted]; and even though appellate judges are closely divided on the issue whether there was sufficient evidence to support a conviction. [citations omitted]. . . .**

Johnson v. Louisiana, 406 U.S. at 362-63, 92 S.Ct. at 1625 (emphasis added). The Court went on to note that if the disagreement of any of the jurors meant that proof beyond a reasonable doubt was lacking, then a hung jury presumably would require a directed verdict of acquittal rather than a mistrial. *Id.*

From this excerpt, we can conclude a number of things about the constitutional meaning of proof beyond a reasonable doubt. First, the Constitution does not require that everyone agree on a matter for something to be proven beyond a reasonable doubt. Rational people, acting rationally, may disagree about the significance of the same set of facts, and such disagreement does not necessarily undermine the presence of proof beyond a reasonable doubt. In a world of fallible human beings with different values and experiences, there is no such thing as absolute proof beyond a reasonable doubt. (Rational people could, of course, make logical or factual errors in a particular case, but we assume throughout that everyone is rational in their analysis.) All that matters under the Due Process Clause is that the jurors be properly instructed on the constitutional standard, that such proof beyond a reasonable doubt be established in the minds of the requisite number of jurors which local law requires for a verdict, and that there be a rational basis in

the evidence for their conclusion. "[W]e can require no more." *Holland v. United States*, 75 S.Ct. at 138. Second, if the presence of a reasonable doubt in the minds of three of twelve jurors does not constitute reasonable doubt in the constitutional sense, then *a fortiori* the evidence is not insufficient merely because others not on the jury (such as judges reviewing the sufficiency of the evidence) have a reasonable doubt or discern a reasonable hypothesis of innocence.

In light of the Supreme Court's definition of proof beyond a reasonable doubt in *Holland v. United States* and *Johnson v. Louisiana* and its explicit rejection of reasonable-hypothesis analysis in *Jackson v. Virginia*, this Court's statements that reasonable-hypothesis analysis is consistent with *Jackson* are simply untenable.

V. OTHER JURISDICTIONS REJECT REASONABLE-HYPOTHESIS ANALYSIS AS AN APPELLATE TEST FOR EVIDENTIARY SUFFICIENCY

Texas admittedly could choose to adopt reasonable-hypothesis analysis as a matter of state law. The impressive number of states rejecting that approach weighs against that option.

The Supreme Court of Washington recently wrote on the question:

> . . . We believe that this issue is before us today because of confusion concerning the oft-stated rule that circumstantial evidence must be strong enough to exclude every reasonable hypothesis of innocence. . . .
>
> . . . .

In circumstantial evidence cases, this court has often failed to maintain the appropriate distinction between the applicability of the hypothesis of innocence rule at the trial court level and the applicability of the reasonable doubt standard of review on appeal. We have recognized that the elimination of hypotheses of innocence is the process by which the trier of fact reaches a determination of guilt beyond a reasonable doubt, and we have mistakenly stated that a conviction based on circumstantial evidence may be sustained on appeal or review if the evidence is sufficiently strong to exclude every reasonable theory of innocence. . . .

. . . . The defendant maintains that this court must reverse her conviction for possession of cocaine because the circumstantial evidence in support of that conviction supports an equally reasonable theory that she did not know that she possessed cocaine. We disagree.

The defendant is, in essence, asking this court to sit as a judge or jury making findings of fact and to apply the hypothesis of innocence rule *de novo* to the evidence presented at her trial to determine if, in our view, the hypothesis that she did not know that she possessed cocaine is sufficiently reasonable to warrant reversal of her conviction. It is not the role of an appellate court to do that. . . .

When an appellate court independently reviews the evidence presented at trial to determine whether, in its view, there are reasonable theories consistent with the defendant's innocence, it replaces the trier of fact's overall evaluation of the evidence with its own. A theory of innocence which appears to be reasonable to an appellate court on review of the record may have been rejected as unreasonable by the trier of fact in view of the evidence and testimony

presented at trial. It is the function of the trier of fact, and not of an appellate court, fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. See Jackson v. Virginia [full citation omitted].

In viewing evidence which could support contrary inferences, the trier of fact is free to choose among conflicting inferences of the evidence and may, *within the bounds of reason*, reject that inference which is consistent with the innocence of the accused. [citation omitted] Thus, when faced with a record of historical fact which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law. See Jackson v. Virginia [citations omitted].

Accordingly, we hold that, in reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. [citation omitted] If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it. . . .

. . . . In reviewing the sufficiency of circumstantial evidence to support a conviction, an appellate court need not concern itself in any way with evidence which might support other

> theories of the crime. An appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered.

Poellinger v. State, 451 N.W.2d at 756-58 (emphasis in original).

The Supreme Court of California, sitting en banc, discussed the same issue:

> . . . . Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citation omitted], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment [citation omitted]' "

People v. Bean, 46 Ca1.3d 919, 251 Cal. Rptr. 467, 760 P.2d 996, 1003 (1988).

Just months ago, Idaho also rejected reasonable-hypothesis analysis. The intermediate appellate court stated:

> The argument is conceptually flawed. The "reasonable hypothesis" rule is an elaboration of the state's burden of proof at trial; it is not a standard for appellate review of jury verdicts. . . . the "reasonable hypothesis" rule does not empower an appellate court to second-guess the inferences reasonably drawn from circumstantial evidence by a properly instructed jury.

State v. Randles, 115 Idaho 611, 768 P.2d 1344, 1346-47 (Ct.App. 1989). The Idaho Supreme Court affirmed on appeal:

> The function of an appellate court with regards to the facts of a case is to determine whether there was substantial and competent evidence supporting the verdict. [citation omitted] To require the court at the appellate level to evaluate whether the evidence suggests any reasonable hypothesis of innocence of a defendant already convicted by a jury would be an impermissible usurpation of the role of the trier of fact.

State v. Randles, 787 P.2d 1152, 1158 (Idaho 1990).

To quote from additional cases would unduly lengthen the brief. However, many other states have also repudiated the reasonable-hypothesis test as an appellate tool. *Des Jardins v. State*, 551 P.2d 181, 184-85 (Alaska 1976); *State v. Nash*, 694 P.2d 222, 234 (Ariz. 1985); *Ciccaglione v. State*, 474 A.2d 126 (Del. 1984); *Ford v. United States*, 498 A.2d 1135 (D.C. Ct. App. 1985); *Youngblood v. State*, 179 Ga. App. 163, 345 S.E.2d 634 (1986); *People v. Eyler*, 133 Ill.3d 173, 549 N.E.2d 268, 276 (1989); *Kidd v. State*, 530 N.E.2d 287 (Ind. 1988); *State v. Radeke*, 444 N.W.2d 476, 479 (Iowa 1989); *State v. Morton*, 230 Kan. 525, 638 P.2d 928 (1982); *Hines v. State*, 58 Md. App. 637, 473 A.2d 1335, 1347-49 (1984); *People v. Johnson*, 137 Mich.App. 295, 357 N.W.2d 675 (1984); *Stokes v. State*, 518 So.2d 1224 (Miss. 1988); *State v. Buchanan*, 312 N.W.2d 684, 689 (Neb. 1981); *State v. Sutphin*, 107 N.M. 126, 753 P.2d 1314, 1318 (1988); *State v. Jones*, 303 N.C. 500, 279 S.E.2d 835, 837-38 (1981); *State v. Jacobson*, 419 N.W.2d 899, 901 (N.D. 1988); *Commonwealth v. Sullivan*, 472 Pa.

129, 371 A.2d 468, 478 (1977); *State v. Caruolo*, 524 A.2d 575, 581 (R.I. 1987); *State v. Neale*, 145 Vt. 423, 491 A.2d 1025, 1031-32 (1985); *State v. Couch*, 44 Wash. App. 26, 720 P.2d 1387, 1389 (1986).[5]

Similarly, the lower federal courts unanimously abandoned the reasonable-hypothesis test as a mechanism for appellate review of federal convictions. The Fifth Circuit, recognizing that it was the last to fall into line, stated:

> . . . It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. [footnote 3, omitted, cites decision from all other circuits] A jury is free to choose among reasonable constructions of the evidence.

United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982), *aff'd*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983).

An especially cogent critique (both practical and philosophical) of reasonable-hypothesis analysis appears in *United States v. Nelson*, 419 F.2d 1237 (9th Cir. 1969):

> The "reasonable hypothesis" test was formulated for the evaluation of circumstantial evidence. . . . the Supreme Court rejected the test in *Holland* on the premise that there is no essential difference in the mental processes required of the jury in weighing direct and circumstantial

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[5] Robert Huttash and Carl Dally of the State's Attorney's Office have generously shared their ideas and research on the issues discussed in this brief. A number of decisions cited in this brief were unearthed by Mr. Huttash and Mr. Dally.

evidence. [footnote omitted] As to both, "the jury must use its experience with people and events in weighing probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more." Holland, 348 U.S. at 140, 75 S.Ct. at 138.

The key word is "probabilities." The jury cannot determine that a proposition is true or false, but only that it is more or less probable. Guilt "is proved beyond a reasonable doubt if it proved not only to be more probable than its contradictory but much more probable than its contradictory." Adler & Michael, The Trial of an Issue of Fact I, 34 Colum. L. Rev. 1224, 1256 (1934). The required degree of probability is reached if the jury is free of "the kind of doubt that would make a person hesitate to act" in the more serious and important affairs of his own life. Holland v. United States, *supra*, 348 U.S. at 140, 75 S.Ct. at 138.

It adds only an illusion of certainty, and is both misleading and wrong, to attempt to describe this broad exercise of practical judgment in abstract generalizations borrowed from the terminology of formal logic.

The "reasonable hypothesis" test does not reflect what juries and reviewing courts in reality do. Juries constantly convict, and the convictions are duly affirmed, on evidence upon which none would hesitate to act but which cannot be said to exclude as a matter of inexorable logic, every reasonable hypothetical consistent with innocence. [footnote omitted]

Moreover, the impression left by appellate court opinions is that the "reasonable hypothesis" standard may lead to serious departures from the proper appellate role in evaluating the sufficiency of evidence. Courts following the rule exhibit a noticeable tendency to divide the

> evidence into separate lines of proof, and analyze and test each line of proof independently of others rather than considering the evidence as an interrelated whole.[6] The sufficiency of the evidence is often tested against theoretical and speculative possibilities not fairly raised by the record, and inferences are sometimes considered which, though entirely possible or even probable, are drawn from evidence which the jury may have disbelieved.

United States v. Nelson, 419 F.2d at 1244-45.

This is an impressive array of authority against the reasonable-hypothesis test. The Court should not lightly ignore it:

> The fact that other jurisdictions and textbook writers have criticized a rule we have embraced does not, standing alone, furnish a reason for abandonment of such rule. However, if precedent does not have some sort of reasonable underpinning, we should not bury our heads in the sand when such criticism is voiced.

Chambers v. State, 711 S.W.2d at 247; *Ballew v. State*, 640 S.W.2d 237, 244 (Tex. Crim. App. 1982).

VI. A REPRISE OF REASONABLE-HYPOTHESIS ANALYSIS IN TEXAS LAW

After *Jackson v. Virginia* was decided, this Court suggested that reasonable-hypothesis analysis was appropriate for two related reasons:

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[6] Regarding this particular problem, see the Court's recent opinion in *Villalon v. State*, #1297-87 (Tex. Crim. App.; June 6, 1990) (not yet published).

(1) " . . . if the evidence supports an inference other than the guilt of the appellant, a finding of guilt beyond a reasonable doubt is not a rational finding." *Carlsen v. State*, 654 S.W.2d at 449, and dissenting opinion by Judge McCormick, 654 S.W.2d at 450;

(2) reasonable-hypothesis analysis is the "same mental process that a rational trier of fact would employ in logically analyzing any circumstantial evidence case, weak or strong." *Chambers v. State*, 711 S.W.2d at 245.

The State's argument here is to an extent a recapitulation of points made earlier. However, as the State is also faced with the task of convincing the Court not to adopt reasonable-hypothesis analysis as a state-law concept, the arguments bear repeating. This is especially so given the strong surface appeal of the idea that guilt logically cannot have been proven beyond a reasonable doubt if the evidence also supports an inference of innocence.

That idea is presumably a correct one in the abstract world of the academic logician. In that environment, the rules of logic are clearly set out, each relevant fact can be properly specified, and, most important, the weight to be accorded each fact may also be identified. Once that is done, a rigorous application of logic to known facts having known weights should lead to a single correct conclusion.

In the world in which we actually live, there is always a variable. Although the rules of logic stay the same and although we can isolate the facts by "viewing the evidence in the light most favorable to the verdict," there is no single "correct" weight to be given those facts. As we have argued before, the weight accorded a fact is a

function of one's experience. The range of weights that may appropriately be ascribed to the facts is as broad as the range of normal human experience, and consequently a range of "reasonable" conclusions will result. This is why in the real world, on the same facts, proof of guilt beyond a reasonable doubt may exist alongside a reasonable hypothesis of innocence.[7] *See United States v. Nelson*, 419 F.2d at 1245 ("It adds only an illusion of certainty, and is both misleading and wrong, to attempt to describe this broad exercise of practical judgment [referring to jury's deliberations on guilt] in abstract generalizations borrowed from the terminology of formal logic."). Proof beyond a reasonable doubt does not require mathematical certainty. *Holland v. United States*, 75 S.Ct. at 137.

As to the second justification for reasonable-hypothesis analysis (that it is merely using the same methodology the jury would use), the State emphasizes what other jurisdictions have noted: the *only* appropriate use of reasonable-hypothesis analysis is as a general description of how *an individual jury* should approach its task. Even there, no mathematical certainty can or should be required of the deliberative process. *Holland v. United States*, supra. When that analysis is transported to the *appellate* realm, the appellate judges necessarily become the 13th juror. If the appellate court, in the face of a reasonable hypothesis of guilt, must order an acquittal

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[7] In this respect, the universally accepted requirement that the evidence be viewed in the light most favorable to the verdict means that a reviewing court must presume that the trier of fact not only resolved all factual disputes in the State's favor but also accorded the incriminating evidence the greatest weight to which it reasonably could have been entitled.

because there is also a reasonable hypothesis of innocence, the rational verdict of a jury is subject to revision simply because the judges would have decided the case differently. That surely should not be the law.

The State is well aware that the use of reasonable-hypothesis analysis has a long history in Texas. At least as early as 1863 a conviction was reversed under reasonable-hypothesis theory. See *Elizabeth v. State*, 27 Tex. 329 (1863) (no citation of authority). Significantly, the early decisions indicate that the analysis was based on nothing more than common law. *See Hampton v. State*, 1 Tex. Ct. App. 652 (1877); *Pogue v. State*, 12 Tex. Ct. App. 283 (1882), which cite treatises and decisions from other jurisdictions. Thus, the doctrine seems purely court-made and subject to immediate revision if warranted by more enlightened thought. As preceding sections demonstrate, there is a marked trend away from resort to reasonable-hypothesis analysis. *Hankins v. State*, 646 S.W.2d at 198-99. Moreover, the language used in the early cases to describe the reasonable-hypothesis rule (such as satisfaction to a "moral certainty" and appellate review "in light of the presumption of innocence") is identical to that repudiated by this Court. *See Houston v. State*, 663 S.W.2d at 456; *Carlsen v. State*, 654 S.W.2d at 449-50. A more recent and respected treatise, *Wigmore on Evidence*, was one of the authorities cited when the Court rejected the necessity of a jury instruction on circumstantial evidence.

In addition, the Court should abandon reasonable-hypothesis analysis because that theory is at odds with every remaining decision of the Court on related topics. *Hankins v. State* did away with the need for a circumstantial evidence charge because it was useless and confusing

once the Court acknowledged there was no intrinsic difference in the quality of direct and circumstantial evidence. *Chambers v. State* rejected the special rule for "weak" circumstantial cases. There is no right to voir dire the jury panel regarding the old circumstantial evidence charge. *Spence v. State*, # 69,341 (Tex. Crim. App.; June 13, 1990) (not yet published). Why should this one aspect of circumstantial evidence law, the reasonable-hypothesis analysis, survive? If reasonable-hypothesis analysis is appropriate, would it not be logical for the State to avoid application of the construct by seeking to invoke the old "close juxtaposition" rule in which strong but technically circumstantial evidence was "deemed" direct evidence? See *Frazier v. State*, 576 S.W.2d 617 (Tex. Crim. App. 1978). Could the State not similarly fend off use of the construct in cases where only the culpable mental state was proven circumstantially by analogizing to prior decisions holding that a charge on circumstantial evidence was not required in such situations?[8] See *Schwartz v. State*, 357 S.W.2d 393 (Tex. Crim. App. 1962). Indeed, if the construct makes any sense at all, would it not have to be equally applicable to both direct and circumstantial evidence cases? Although *Carlsen v. State* alludes to this possibility, 654 S.W.2d at 450, the State is aware of no case in which the Court has applied reasonable-hypothesis analysis to a direct evidence case. Finally, if reasonable-hypothesis analysis is taken to its logical conclusion, a conviction could not be upheld unless the appellate judges were

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[8] See the argument advanced by the State's Attorney's Office in *Miguel Angel Garcia v. State*, #04-88-422-CR (Tex. App. – San Antonio, Mar. 30, 1990).

themselves unanimous. That of course has never been the law, but if the appellate judges accord themselves the right to reasonably disagree, why should jury verdicts be treated with less deference? *See Beardsley v. State*, 738 S.W.2d 681, 685-86 (Tex. Crim. App. 1987) (Judge Duncan concurring and dissenting) (Court of Criminal Appeals should normally not review sufficiency decisions of the courts of appeals even if lower court was wrong). *See also Carter v. State*, #979-90 (Tex. Crim. App.; June 20, 1990) (not yet published) (Judge Clinton concurring in refusal of appellant's petition for review) ("we are satisfied that a rational appellate court *could* determine and declare [that "Rose" error was harmless beyond a reasonable doubt]") (emphasis added). Consistency alone counsels against retention of the reasonable-hypothesis construct.

Another point to keep in mind is that when reasonable hypothesis analysis had its origins, the consequence of a reversal for insufficient evidence was merely a remand for a new trial. Only in the late 1970s did such a reversal mean that a judgment of acquittal was entered. See *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978). Prudence dictates that rules be re-examined when their consequences change. See *Lehman v. State*, #383-87 (Tex. Crim. App.; June 20, 1990) (not yet published) (footnote 1).

Finally, the reasonable-hypothesis construct is inconsistent with the Court's approach to sufficiency of the evidence in *Blankenship v. State*, 780 S.W.2d 198 (Tex. Crim. App. 1989). Indeed, *Blankenship* could be read to implicitly overrule the reasonable-hypothesis aspect of *Carlsen* and *Butler*. *Blankenship* addressed the sufficiency

of the evidence to establish that a certain structure was a habitation. If we are not reading too much into the various opinions in that case, the Court seemed to divide into one camp (the majority on original submission) which believed that on a given set of facts there could be only a single rational resolution of the structure's status, while the other camp (the majority on rehearing) believed not only that there could be divergent but equally rational resolutions but also that the reviewing court must defer to the jury's decision if it is a reasonable one. On rehearing, the majority stressed that any other approach placed the Court in the position of 13th juror. The argument which the State advances here is in accord with *Blankenship*.[9]

For all of the reasons discussed, the Court should abandon the reasonable-hypothesis-of-innocence analysis. That theory is squarely at odds with *Jackson v. Virginia* and the trend of decisions in other jurisdictions. Most important, that theory necessarily makes the appellate court a 13th juror with the power to overturn the

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[9] There are other indications that the Court is retreating from *Carlsen* and *Butler*. In *Herndon v. State*, 787 S.W.2d 408, 409 (Tex. Crim. App. 1990), the Court said, "we need not concern ourselves with whether there is a 'reasonable hypothesis' extant in this cause because . . . " the evidence was insufficient even viewing the evidence in the light most favorable to the verdict (citing *Jackson v. Virginia* and *Butler v. State*). Although ambiguous, this statement could mean the Court believes the evidence in that case came within our "category two" in which no rational trier of fact could convict, but recognizes that in other circumstances the evidence could fall within "category three" in which some but not all rational triers of fact would convict.

verdict of the trial jury even though its verdict was rationally supported by the evidence. Such a usurpation of the jury's function cannot be allowed to continue.

VII. APPLICATION OF THE *JACKSON* TEST TO THE FACTS OF THIS CASE

Viewed in the light most favorable to the verdict, the evidence establishes that:

> 1) A stolen pickup was driven on to the premises of a closed Texaco station. R. V – 17, 21, 35.
>
> 2) Two people were in the pickup; one wore light-colored clothing and the other wore dark-colored clothing. R. V – 37, 54.
>
> 3) The driver was the one in light-colored clothes – specifically, a white T-shirt and cream-colored pants. R. V – 54.
>
> 4) Appellant, the only person found at the scene, wore a white T-shirt, long cream-colored pants, and white tennis shoes. R. V – 53-54.
>
> 5) Appellant was carrying stolen cans of oil; similar cans were in the bed of the pickup. R. V – 50-51, 57.
>
> 6) Three packages of cigarettes on the left side of the pickup's dashboard above the steering wheel bore Appellant's fingerprints. R. V – 94-96.
>
> 7) Appellant falsely stated that he had never seen the truck before. R. V – 50-51, 57, 94-96.

Under the *Jackson v. Virginia* test, the totality of this evidence, especially the driver's side cigarette packages

with Appellant's fingerprints on them and the match between Appellant's clothing and the driver's description, provides ample proof from which the jury could reasonably have concluded beyond a reasonable doubt that Appellant operated the vehicle.

The way the Court of Appeals handled the facts illustrates the pitfalls in reasonable-hypothesis analysis. First, the court segments the evidence instead of viewing its impact as a whole. *See Villalon v. State*, supra. Second, having chosen to separately analyze the impact of the fingerprint evidence and the clothing "match," the court sets itself up as the 13th juror.

With regard to the fingerprints on the cigarette packages, the court concludes such evidence provides only a strong suspicion of guilt and thus may reasonably be reconciled with innocence. Presumably the court does not dispute that smoking drivers frequently flip their cigarette packages on top of the dash for handy access. It is not clear where the court goes from there. Perhaps it thinks Appellant may have never been more than a passenger and that the cigarettes arrived in that location either because Appellant tossed them there from the passenger seat or because the real driver placed them there, perhaps after borrowing a smoke. Perhaps the court believes Appellant was the driver at some point, but not at the time of this incident (which would overlook the fact that the State could rely on the "on or about" language in the charge, R. I – 74). Perhaps the Court of Appeals saw another innocent explanation. However, those explanations are irrelevant under *Jackson v. Virginia*. The only question is whether the jury could rationally

conclude beyond a reasonable doubt that Appellant operated the vehicle, a conclusion which would be eminently reasonable even if the fingerprint evidence were all the State had.

Even more baffling is the court's treatment of the similarity between Appellant's clothing and the description which the police dispatcher received of the driver. In his brief, Appellant conceded that if the information given the dispatcher was believed, then " . . . by elimination, the Appellant must have been the driver." App's brief in Ct. App., p. 7. He then argued that since the testimony concerning the description was second- or third-hand hearsay, it could not rationally support a verdict. Appellant recognized, however, that unobjected-to hearsay was no longer automatically denied probative value. App's brief in Ct. App., pp. 15-17. Instead of pursuing this argument, the Court of Appeals simply sought to distinguish the State's reliance on *Bonner v. State*, 640 S.W.2d 601 (Tex. Crim. App. 1982), where a similarity in clothing was enough to establish identity. Judging from the Court of Appeals' emphasis that Bonner's clothing was "identical" to that described by the witness, we assume the court concluded that an identical match was required as a matter of law and that the match was not identical in Appellant's case. Yet the dispatcher said the driver's description included a white T-shirt and cream-colored pants, which matched Appellant's shirt and pants. We can only assume that the Court of Appeals was troubled by the caller's failure to tell the dispatcher that the driver was also wearing the white tennis shoes which Officer Pierce observed on Appellant's feet. R. V – 54.

In any event, the Court of Appeals again makes itself the trier of fact. The court is deciding for itself how much weight should be accorded the similarity between Appellant's clothing and the driver's description. Not only is this improper; it makes no sense. It would be plausible only if Appellant was a hidden third person in the pickup, wearing light-colored clothing, but not driving. There is, of course, no evidence to support such speculation. The lower court's attempt to distinguish *Bonner* fails.

In short, the evidence was adequate to support the verdict under a correct understanding of the *Jackson v. Virginia* test.

CONCLUSION AND PRAYER

The Court should abandon reasonable-hypothesis analysis. That analysis presumes that proof beyond a reasonable doubt is capable of resolution with a mathematical certainty that neither the Due Process Clause nor common sense requires. That analysis also inevitably places the appellate court in the role of 13th juror.

The judgment of the Court of Appeals should be reversed and the conviction affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this brief has been mailed to Allan Butcher, First City Bank Tower, 201 Main St., Ft. Worth, Texas 76102, and to Robert Huttash, State Prosecuting Attorney, P.O. Box 12405, Austin, TX 78711, on June 28, 1990.

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